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No. 380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

ALFRED A. MAURER and MARCUS W. MYERS, trading as MAURER & MYERS AUTO CONVOY

Appellants

v.

WILLIAM J. HAMILTON, Jr., Secretary of Revenue of the Commonwealth of Pennsylvania; LYNN G. ADAMS, Commissioner of the Pennsylvania Motor Police; and CLAUDE T. RENO, Attorney General of the Commonwealth of Pennsylvania

Appellees

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR APPELLEES

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APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Court of Common Pleas of Dauphin County (R. 479a-498a) is reported in 45 Dauphin County Reporter 341; the opinion of the Supreme Court of Pennsylvania (R. 679a-694a) is reported in 336 Pennsylvania State Reports 17 and 7

Atlantic Reports (2d series) 466; and the similar case commenced before the three-judge Federal Court for the Middle District of Pennsylvania is reported at 29 Federal Supplement 693.*

* This case is entitled BAKER DRIVEWAY CO. INC. ET AL. *v.* HAMILTON, SECRETARY OF REVENUE, ET AL. It was a Bill in Equity to restrain the enforcement of the Pennsylvania statute involved in the present case after the decision of the Supreme Court of Pennsylvania had been handed down.

JURISDICTION OF THIS COURT

Appellees submit that jurisdiction of this court is wanting for lack of a substantial federal question.

(1) The state statute (section 1033 (c) of The Pennsylvania Vehicle Code) regulates the size and weight of a well-defined class of motor vehicles. This appears not only upon the face of the statute, but is also abundantly demonstrated by the findings of both courts below (R. 681, 482a-484a) and the evidence discussed on pages 14 to 46 of this brief. As a regulation of size and weight, the statute can in no event be superseded by federal action other than that provided in section 225 of the Motor Carrier Act, 1935 (49 U. S. C. A. §325), and no action described in that section has been had. SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., 303 U. S. 177 (1938); BARNWELL BROS. *v.* SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, 17 Fed. Supp. 803 (1937); L. & L. FREIGHT LINES *v.* RAILROAD COMMISSION, 17 Fed. Supp. 13 (1937). The action prescribed in section 225 is exclusive as to all regulation of size and weight, whether for general safety regulation or highway conservation. BOTANY WORSTED MILLS *v.* UNITED STATES, 278 U. S. 282, 289 (1929).

(2) As a regulation of size and weight, the statute's validity as an exercise of the state's police power is well established. SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., 303 U. S. 177 (1938); SPROLES *v.* BINFORD, 286 U. S. 374 (1932); MORRIS *v.* DUBY, 274 U. S. 135 (1927). Its application to a par-

ticular class is valid. SPROLES *v.* BINFORD, supra; CLARK *v.* PAUL GRAY, INC., 306 U. S. 583 (1939).

(3) Consequently, appellants' case "goes counter to so many decisions that it must be condemned as unsubstantial": UTLEY *v.* ST. PETERSBURG, 292 U. S. 106, 111 (1934); UNITED STATES *v.* BALTIMORE & ANNAPOLIS R. Co., No. 78 Oct. Term, 1939, 84 L. ed. (adv.) 250, dismissing appeal from BALTIMORE & ANNAPOLIS R. Co. *v.* LICHTENBERG, 4 Atl. (2d) 734.

However, the 1939 amendment of paragraph (c) does not defeat the jurisdiction of this court. The amendment either made no change in the meaning of the act (as the Supreme Court of Pennsylvania held), or if it did accomplish any change, the only change was to narrow the effect of the original paragraph. Some of appellants' vehicles subject to the old paragraph still remain subject to the new paragraph. In either case this court has jurisdiction to consider the statute as amended: TEXAS COMPANY *v.* BROWN, 258 U. S. 466 (1922), ABIE STATE BANK *v.* BRYAN, 282 U. S. 765 (1931).

SUMMARY OF ARGUMENT

I

The Pennsylvania statute in question is a valid exercise of the State's police power, and is, therefore, valid under the Due Process Clause and the Equal Protection Clause of the fourteenth amendment.

The testimony fully supports the findings of the lower courts that the statute is a safety measure designed to protect the highways and the traveling public in Pennsylvania. The statute will have little effect on appellants' business. Appellants have not sustained their burden of proving the act unconstitutional.

II

The Pennsylvania statute is not superseded by the Motor Carrier Act of 1935, nor by any requirements or reports of the Interstate Commerce Commission.

The State law is a size and weight regulation which the Commission has no power to supersede under the Motor Carrier Act. The safety requirements promulgated by the Commission do not serve to supersede the state statute, nor does the Commission's report of March 11, 1939, relating to car-over-cab operations.

The fundamental power of Congress to supersede a state's regulations as to the use of its highways is questioned.

III

The Commerce Clause by its own force does not supersede the Pennsylvania statute, which does not discriminate against interstate commerce.

IV

The court below was entitled to construe the 1939 amendment to the state law before it for consideration, because of the insignificant changes in the amendment, and the record before the court. This court should rely upon the construction of the 1939 amendment by the court below.

ARGUMENT

I.

ACT IS A VALID EXERCISE OF POLICE POWER

The Pennsylvania act here attacked by appellants is section 1033 (c) of The Vehicle Code, as added thereto by section 16 of Act No. 447, approved June 29, 1937, P. L. 2329, (75 PS Sec. 642). The provision was to have been effective immediately upon its approval, and read as follows:

> (c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle.

The remaining provisions of section 1033 were not to become effective until January 1, 1940. These postponed provisions prohibited the operation of haulaways which carry automobiles on two levels, or at a height greater than 115 inches, or with an axle of an automobile carried thereon more than 3 feet higher than any other axle of such carried vehicle. This case is concerned generally with these latter provisions, but more specifically with section 1033 (c).

Section 1033 was amended in 1939 so as to further postpone the effective date of paragraphs (a), (b) and (d) until January 1, 1942. Certain minor changes

were also made to paragraph (c), which will be discussed in detail infra.

Section 1033, as adopted by the 1937 legislature and as amended by the 1939 legislature, is reprinted in full on pages 58 and 59 of this brief.

Under this heading the Commonwealth will attempt to justify this act as a valid exercise of the police power, in reply to appellants' argument that the act deprives them of their property without due process of law (appellants' brief pp. 47-66). From the Commonwealth's standpoint, the argument in the present case should logically commence with an examination of the power of Pennsylvania to enact the legislation here attacked.

A. Section 1033 (c) within the Legislative Power

The Supreme Court of Pennsylvania held that the validity of this section cannot successfully be questioned as an exercise of the police power of the State, citing in support of that conclusion the following decisions of this court: (R. 683) New Orleans Gas Light Company *v.* Louisiana Light and Heat Producing and Manufacturing Company, 115 U. S. 650 (1885); Hendrick *v.* Maryland, 235 U. S. 610 (1915); Kane *v.* New Jersey, 242 U. S. 160 (1916); Hodge Drive-It-Yourself Company *v.* Cincinnati, 284 U. S. 335 (1932); South Carolina State Highway Department *v.* Barnwell Brothers, Inc., 303 U. S. 177 (1938); The court below cited with approval the language of Mr. Justice Butler in Hess *v.* Pawloski, 274 U. S. 352, 356 (1927), as follows:

> Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. * * *

The Supreme Court of Pennsylvania also pointed out that the State Legislature has plenary power to regulate the use of highways and cited in support thereof its previous ruling in COMMONWEALTH *v.* FUNK, 323 Pa. 390 (1936).

Appellants seem to concede that the Commonwealth possesses police powers vested in the legislature to protect the interests of its citizens, and that the legislature may determine what measures are appropriate for the protection of the public safety (appellants' brief, p. 47).

B. Section 1033(c) Not Invalid under Fourteenth Amendment

It can no longer be questioned that once a statute is found to be within the power of the legislature to promote public safety, the method whereby this purpose is achieved is beyond the power of the courts to question, so long as the method bears a reasonable relation to the object sought to be attained.

There is no appeal to the courts from the judgment of the legislature as to the policy which the Commonwealth is to pursue. Likewise, if a statute is within the police power of a state, and bears a reasonable relation to the end desired, oppression, ex-

pense, or other considerations cannot be questioned by the judicial branch of the government.

These rules were ably set forth by Mr. Justice Stone in the case of SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROTHERS, 303 U. S. 177, 190 (1938), as follows:

> * * * When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rest the duty and responsibility of decision. * * * This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. **It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment.** * * * (Boldface ours)

Concerning the state statute involved in that case, Mr. Justice Stone said further (p. 191):

> * * * **Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility.** Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record

whether it is possible to say that the legislative choice is without rational basis. * * * (Boldface ours)

The same rule was adopted by this court in the opinion of Mr. Justice Stone in CLARK *v.* PAUL GRAY, INC., 306 U. S. 583, 595 (1939).

In CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* MAGUIRE, 219 U. S. 549, 569 (1911), this court said:

> * * * The scope of judicial inquiry in deciding the question of **power** is not to be confused with the scope of legislative considerations in dealing with the matter of **policy**. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. (Boldface ours)

In POWELL *v.* PENNSYLVANIA, 127 U. S. 678 (1888), affirming 114 Pa. 265, this court, in sustaining the constitutionality of the Pennsylvania oleomargarine law, stated as follows:

> * * * The legislature of Pennsylvania upon the fullest **investigation**, as we must conclusively presume, * * * has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes

> of food, * * * will promote the public health, and prevent frauds in the sale of such articles. * * * (Boldface ours)

And as to oppression, this court said:

> * * * If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

In the instant case the Supreme Court of Pennsylvania quoted with approval (R. 685) the following statement of the same rule by Mr. Justice Roberts in NEBBIA *v.* NEW YORK, 291 U. S. 502, 537:

> If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.

C. Findings of Fact Support Validity of Section 1033(c)

The act here involved prohibited the transportation of automobiles by the haulaway method, if part or all of any automobile rests over the cab of the carrying vehicle. Appellants have failed to meet their burden of proving that such haulaway operations are safe and are not a suitable subject of legislative interfer-

ence. On the contrary, the findings of fact by the trial court and by the Supreme Court of Pennsylvania conclusively demonstrate that the presence of a car over the cab of the truck-tractor is unsafe.

The findings of fact by the Supreme Court of Pennsylvania are aptly summarized in the opinion of that court, as follows (R. 683, 684):

> In view of the convincing evidence on the part of defendants of the many dangers inseparably connected with this method of transporting automobiles, it seems to us the fact is conclusively established that the presence of a car over the cab of a truck-tractor is unsafe. The findings of the court below in this regard are fully supported by the testimony of witnesses well qualified by technical training to express an opinion upon the subject, and by practical experience in the operation of such vehicles to testify to the dangers attending their use. There is, therefore, no merit in the contention of plaintiffs that the provisions of the section are arbitrary and not reasonably related to public safety, or that the car-over-cab carriage of automobiles is not a proper subject for legislative prohibition.

It has generally been held that findings of fact by State courts will not be made the subject of inquiry by this Court: First National Bank of Shreveport *v.* Louisiana Tax Commission, 289 U. S. 60, 67 (1933). Special weight will be given to findings concurred in by the State trial and appellate courts: Portland Railway Light and Power Company *v.* Railroad Com-

MISSION OF OREGON, 229 U. S. 397, 412 (1913); GRAYSON *v.* HARRIS, 267 U. S. 352, 357 (1925); PURE OIL COMPANY *v.* MINNESOTA, 248 U. S. 158, 165 (1918).

In addition, this court has ruled that the record is to be examined to ascertain whether it is possible to say that the legislative choice is without rational basis, and not to say whether the findings of the court below are supported by the evidence: SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., 303 U. S. 177 (1938), supra. The appellants' specification of errors (appellants' brief, p. 10) does not assign as error the failure of the evidence to support the findings of the court below. Therefore, such findings of fact are binding on this court in the present case.

Nevertheless, the following examination of the evidence presented before the trial court reveals that the findings of fact are supported in every detail. The Supreme Court of Pennsylvania found that the evidence presented on behalf of the Commonwealth proved that the operation of a truck-tractor with a car over the cab was dangerous and unsafe, and classified the testimony as showing certain facts specifically enumerated. It is our purpose to consider the testimony in support of such facts.

1. ABNORMALLY HIGH CENTER OF GRAVITY MAKES CAR OVER CAB UNSAFE

The Supreme Court of Pennsylvania found the testimony established as a fact that "**the automobile over the cab raises the center of gravity of the vehicle, resulting in making its operation difficult, particularly on the curves of the type to be found in Pennsylvania.**" (R. 681). This finding affirms the findings of fact, Nos.

14 and 15, made by the chancellor (R. 482a).

Three expert witnesses testified as to center of gravity.

Professor Ulmann testified for the appellees. He is a member of the faculty of the Towne Scientific School of the University of Pennsylvania, eminently qualified by education and experience as a mechanical engineer and physicist (R. 358a, 359a). He testified that he never was employed by the Commonwealth prior to this case (R. 421a).

Contrast with the impartiality of Professor Ulmann, the connections of Messrs. Judd and Francis with the industry represented by the plaintiffs and intervenors, for whom they testified. The testimony indicated that there were two large manufacturers of convoy equipment (R. 144a); Mr. Francis was a representative of one such company (Mechanical Handling Systems, Incorporated, producers of Francis trailers, (R. 127a), and Mr. Judd was employed by the other (Whitehead & Kales, R. 440a). The companies undoubtedly have a definite interest in the outcome of the present case.

Therefore, Professor Ulmann was the only disinterested expert witness on the point of center of gravity.

Moreover, Professor Ulmann's testimony included calculations based on actual equipment and the actual measurements thereof. He found that exhibit J had a center of gravity of 3.93 feet without the car over the cab and a center of gravity of 5.95 feet with the car over the cab (R. 372a). This testimony was based

on exhibits showing the formulae and calculations in accordance with the laws of physics.

Contrast with this the inability of Mr. Francis to state the formulae of physics whereby the center of gravity was determined (R. 138a-142a). One of his exhibits (No. 10, R. 538a) showed a tipping angle of a truck with double tires on the front wheels (R. 134a, 373a, 374a, 375a, 418a). Such testimony is not expert.

Mr. Judd used as the basis for his computation a two-ton truck with a load of 9200 pounds, in order to make the center of gravity almost as high as that of light weight haulaway equipment (exhibits nos. 32, 33, R. 445a-450a, 461a, 462a, 569a, 570a). Incidentally, Mr. Judd's own exhibits show that the horizontal center of gravity is much farther to the front in the type of equipment with car over the cab than it is in the ordinary truck. This latter fact alone tends to prove that this equipment is unsafe (R. 362a). When the horizontal center of gravity was too far forward, it results in excess weight on the front wheels, which caused dangerous results discussed infra in this brief.

In further support of the finding of the court that the high center of gravity makes the car-over-cab equipment unsafe, we refer to the testimony of the three drivers to the effect that this type of equipment leans to the side of the road (R. 334a), that the equipment is top-heavy (R. 343a), that there was an inside pull on the road on a high-crowned road (R. 353a), and that there is a side thrust on the bottom of the wheel by reason of the higher center of gravity (R. 318a).

It was definitely established that the high center of gravity is most serious on curves, and that a truck-tractor with a car over the cab must be operated at 27 percent less speed to be safe (R. 361a). A driver testified that the inside pull was greater on curves (R. 353a), and Professor Ulmann testified that the high center of gravity affects braking on curves (R. 377a).

The radii and degrees of 17 sample curves in Pennsylvania (not the worst in the Commonwealth, R. 221a, 222a) were introduced into evidence (R. 216a-223a), the most extreme being a curve of 90° with a radius of 29 feet. The various plaintiffs were bound to travel over these curves, because in applications to the Interstate Commerce Commission for certificates, the entire State was reserved as routes (R. 112a, 174a, 209a, 210a).

The court below also took judicial notice of the topography of Pennsylvania and the numerous hills and mountains therein; testimony to this effect was presented (R. 215a).

This evidence clearly supports the finding of fact by the Supreme Court of Pennsylvania that the automobile over the cab raises the center of gravity of the vehicle, resulting in making its operation dangerous throughout Pennsylvania.

2. Excess Weight Adversely Affects Steering, Axles, Tires, Braking, Headlights and Balance

The Supreme Court of Pennsylvania found as a fact that "**excess weight is placed upon the front wheels of the truck-tractor, thereby affecting detrimentally**

its steering, the action of its brakes, and throwing its headlights out of focus, to the danger of oncoming traffic" (R. 681). This finding affirms findings of fact by the trial court, Nos. 16, 17, 18 and 19 (R. 483a).

(a) *Steering*

As to difficulty of steering, the testimony of the drivers indicated that this type of equipment was difficult to steer, because of the pressure on the front wheels (R. 331a, 334a, 342a, 344a, 345a, 346a, 354a).

Doctor King, an expert, testified that the car over the cab makes for oversteering (R. 317a), makes steering more difficult (R. 322a), making it difficult to lift the front of the vehicle (R. 318a), and making it harder to deflect on account of the concentrated weight (R. 323a); this latter testimony was not rebutted, but evaded by plaintiffs' witnesses (R. 455a, 470a). Doctor King also called attention to the pressure on the outside of the wheels (R. 318a).

Professor Ulmann testified that the steering gear is overloaded (R. 377a), which makes for oversteering (R. 414a, 415a, 416a), and makes steering more difficult (R. 414a). The car over the cab has an unbalanced effect on the steering (R. 359a), the overloaded steering gear results in fatigue to the driver (R. 378a).

(b) *Axles*

Doctor King testified that the axles on tractors are not reinforced (R. 322a).

Professor Ulmann testified that the presence of the car over the cab affects the weight on the front axle

(R. 362a), and that the danger comes in increasing the loads on the axles (R. 362a). The front axles are overloaded (R. 376a), and there are shocks at the front as being at the end of the lever arm (R. 378a). The axles of tractors are not reinforced for these purposes (R. 376a).

Irving H. Judd, an expert witness for the appellants, testified that the weight on the front axle, as shown on exhibit No. 32, is 4560 pounds (R. 446a), and that the recommended gross weights of the manufacturers is 3600 pounds on the front axle, being an overweight of nearly 1,000 pounds (R. 462a), as compared with the so-called normal load, (see Print No. 3165, R. 570a), on which the comparison is based; this imposes a pay load of 9271 pounds on a two-ton truck), which shows the weight on the front axle of only 2890 pounds (R. 464a).

There can be no doubt that the car over the cab results in overloading the axles as plaintiffs' own testimony shows. This results in dangers of operation not present in the operation of trucks hauling normal or even excess loads in the proper place.

Appellants seek to justify the excess weight placed on front axles by invoking section 903 (d) of The Vehicle Code (75 PS §453) containing the maximum weight provisions (appellants' brief, p. 53). Both section 903 (d) and section 1033 (c) are intended to protect the highways and the safety of the traveling public. Section 903 (d) is general in its scope. It is not irrevocable, but may be changed in specific instances. The legislature has simply said that cars shall not be carried over cabs of convoys. Thus, section 1033 (c), as the later specific provision, is con-

trolling over section 903 (d), the earlier general provision, if there is any conflict between them. There is nothing to indicate that the legislature did not consider the dangerous effect of the weight over the cab on axles, tires, steering, etc., when section 1033 (c) was enacted.

(c) *Braking*

As to the effect on braking, Professor Ulmann testified that the car over the cab had an unbalanced effect on braking (R. 359a), and that the high center of gravity affects braking on curves (R. 377a). He also pointed out the impact from braking on the overloaded axles (R. 377a).

(d) *Tires*

Doctor King testified that there is a side thrust on the bottom of the outside wheel which increases with the height of the center of gravity (R. 318a). Mr. Judd, in addition to his testimony about overloaded axles, admitted that the tires with the greatest front axle load are overloaded only by about 10 percent (R. 464a).

(e) *Headlights*

The finding of the court below, to the effect that the excess weight caused by the car over the cab adversely affects the headlights, is supported by the following testimony:

Leroy Marshall, a driver, testified that the loaded vehicle caused the lights to be raised, so that it was necessary to drive with the low lights on; this was

because the vehicle was inspected when empty (R. 353a).

Professor Ulmann testified that the downward and upward force from the trailer would keep the headlights bobbing up and down due to the action on the pintle pin (R. 379a).

Mr. Francis in substance testified that the weight of the haulaway was very delicately balanced (R. 152a). The inevitable result would be that any change in the type and weights of automobiles hauled would have the effect of lowering or raising the light beams.

Lights are thrown upward in the absence of a car over the cab only when the fifth wheel is behind the rear axle of the tractor. Appellants overlook the effect of this variable in contending that the car over the cab does not interfere with the lights (cf. appellants' brief, p. 54). Unquestionably, the front wheels are always overloaded when the fifth wheel is not behind the rear axle. When the fifth wheel is behind the rear axle, the front wheels are overloaded when the convoy is in motion (R. 378a, 392a, 394a, 412a). This testimony had not been contradicted.

When the fifth wheel is not behind the rear axle, the headlights are not affected. When the fifth wheel is behind the rear axle, the headlights are affected whether or not the car is in place over the cab of equipment so designed. The headlight trouble is caused by the position of the fifth wheel behind the rear axle. Yet plaintiffs have admitted throughout the case that no attempt has been made to move the fifth wheel to a safe position over, or in front of, the rear axle. (See p. 49 infra.)

(f) *Delicate Balance*

The trial court found that the excess weight of the car over the cab so affects the balance of the haulaway as to make its operation unsafe (R. 483a).

The testimony in support of this finding is as follows:

Plaintiffs' witnesses testified that lifting the car off of the cab throws the combination out of balance (R. 45a, 49a, 50a, 61a, 89a, 93a, 94a, 98a, 196a, 130a).

Although plaintiffs' witnesses testified that less than a full load is seldom carried, and then never less than three cars on a four-car haulaway, nevertheless, exhibit I (R. 584a) shows that convoys carry less than a full load, as does the testimony of drivers Baxter (R. 336a), and Mitchell (R. 329a, et seq.). Both drivers testified that the car over the cab would be moved back whenever possible (R. 339a, 331a).

Professor Ulmann testified concerning balance, as follows:

1. Car over the cab makes for an unbalanced body (R. 359a);

2. Load in the rear aids stability only slightly (R. 367a, 394a, 395a, 396a);

3. The fifth wheel should be over the rear axle of the tractor, because there the springs can take the load impacts best, and the seesaw action on the front of the vehicle is best prevented (R. 392a); fifth wheel over the axle is the best construction (R. 412a);

4. The operation of the tractor with one car over the cab is unsafe (R. 398a, 452a);

5. While Doctor King testified that the loaded trailer exerts the upward pressure on the front of the tractor (R. 320a), Professor Ulmann explained that this was a static condition, and not dynamic (R. 378a, 392a, 394a, 412a).

The general effect on the safety of operation is easily demonstrated by the following considerations:

1. Counsel for plaintiffs agrees that the car over the cab alone is unsafe (R. 398a); nevertheless plaintiffs attempt to show that the weight of the trailer makes the operation safe.

2. Mr. Judd has admitted that there is an excess load on the front axle (R. 462a).

3. Professor Ulmann has testified, without contradiction, that the load carried on the trailer does not necessarily lessen the load on the tractor when the combination is running over the roads (R. 378a, 392a, 394a, 412a).

Combining counsel's admission with that of Mr. Judd, it is clear, from plaintiffs' own case, that the operation of haulaways is adversely affected by the presence of a car over the cab.

3. Car Over Cab Obstructs Vision

The Supreme Court of Pennsylvania made the following finding of fact regarding the impairment of vision by the presence of a car over the cab: "**The extension of the carried automobile and the vertical framework supporting it over the cab of the truck-tractor obstruct the vision of the operator, as well as that of drivers of overtaking vehicles**" (R. 681). This finding affirmed findings of fact, Nos. 20, 21 and 22, of the trial court to the effect that the presence of

the automobile over the cab obstructs the vision of the operators of overtaking vehicles and of the operator of the truck-tractor, and that the runway over the hood and the vertical frame-work supporting it likewise impair the vision of the operator (R. 483a).

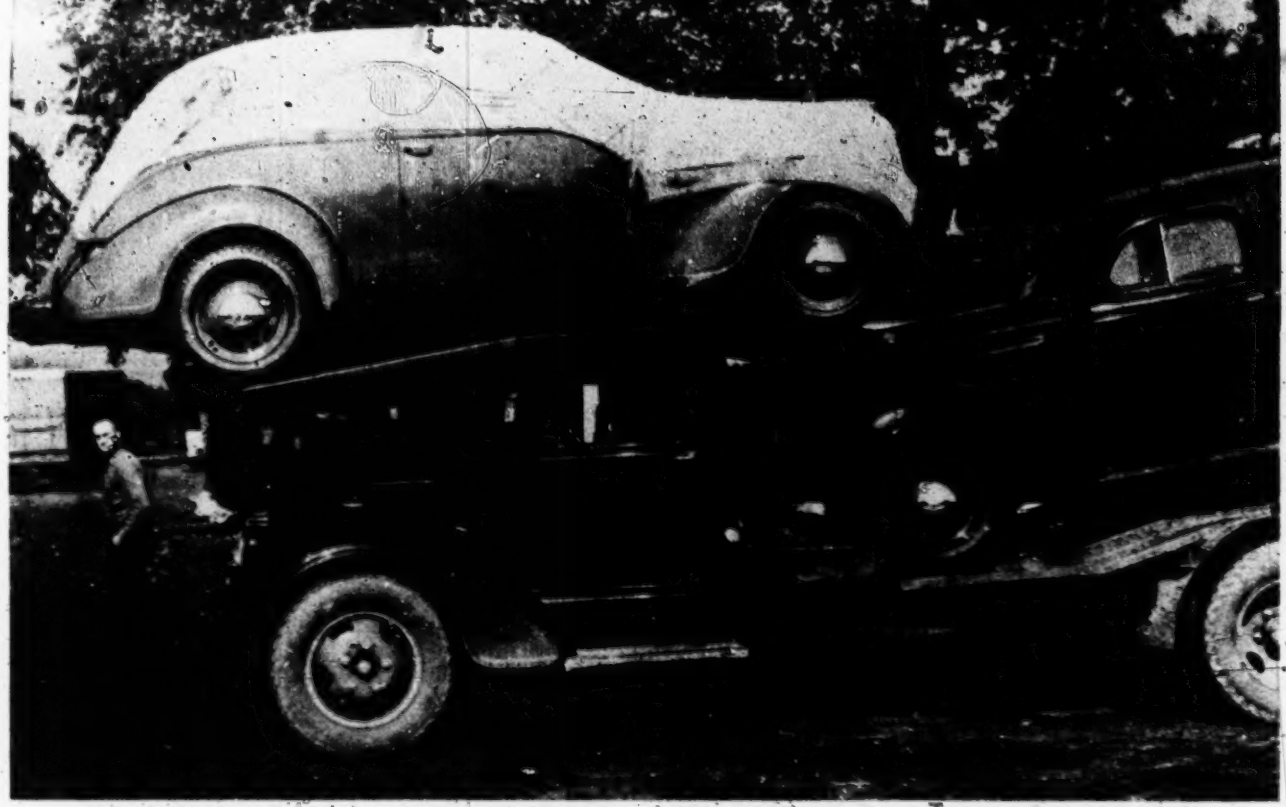
As to the obstruction of the vision of the drivers of oncoming vehicles, Professor Ulmann testified that the vision of other drivers passing a tractor with a car over the cab was obscured (R. 410a).

The evidence adequately supports the court's findings that the presence of the car over the cab obstructs the driver's vision.

The drivers of car-over-cab equipment testified their vision of red lights (R. 332a, 335a, 340a, 345a), trees (R. 331a, 337a, 338a, 345a), underpasses (R. 340a), and other objects (R. 335a) was obscured. A driver who testified for the appellants admitted that he had rigged up an ingenious system of mirrors for the purpose of seeing red lights, etc. (R. 438a); thus he admits in effect that the car over the cab is a definite obstruction to the operator's vision under normal circumstances.

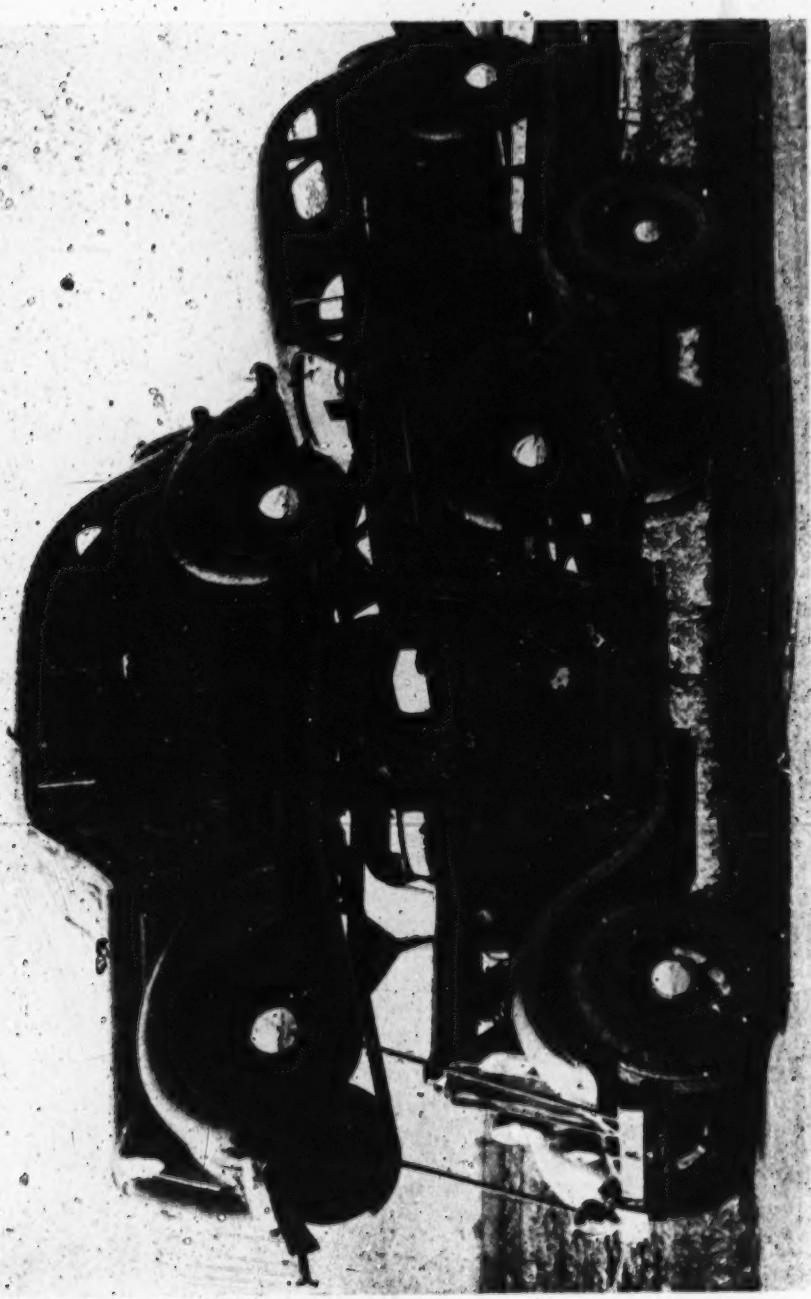
Professor Ulmann, by exhibits NN (R. 646a) and OO (R. 648a), calculated (R. 388a) that vision of red lights was impaired at the distance of 103 feet from the intersection, and absolutely obscured at 81 feet therefrom (R. 389a); these exhibits and statistics were based on measures of exhibits E and F by Sergeant Shaeffer (R. 233a-234a).

Defendants' Exhibits I (R. 584a) and U (R. 596a) represent photographs taken from the inside



This photograph illustrates how the car is loaded over the cab of the truck-tractor, how far the front of the car over the cab protrudes beyond the front of the truck, and how the vision of the driver may be impaired as to overhead objects.

Defendants' Exhibit E (R. 580a)



This photograph illustrates the type of support used in locating the cameras over the cab. The hardware of this equipment is

of the cabin over which a car is carried (R. 225a, 227a). These photographs were taken by a camera that operates from eye level, leaving the lens possibly 2 inches below eye level (R. 229a).

As to the runway over the hood, Sergeant Shaeffer testified that the runway over the hood obscured the vision (R. 235a), as shown on exhibit O (R. 231a).

The evidence also supports the court's finding that the vertical supports impair the operator's vision. Exhibits O (R. 590a) and P (R. 591a) were introduced to show the extent to which the supporting framework impairs the operator's vision.

Sergeant Shaeffer testified that the supporting strut interferes with the vision (R. 234a). While Professor Ulmann was testifying as to the impairment of vision by side supports, such impairment was likewise admitted by plaintiffs' counsel (R. 390a, 391a, 398a).

4. Car Over Cab Causes Operation on Wrong Side of Road

The Supreme Court of Pennsylvania made the following finding of fact, pertaining to the presence of the car over the cab and its resultant effect on the operation of the vehicle on the wrong side of the road: "**Overhead and lateral obstructions along the highway cause the truck-tractor to be operated upon the wrong side of the road, to avoid scratching and damage to the carried vehicle**" (R. 681, 682).

This affirms finding of fact No. 23 of the trial court (R. 483a).

The testimony in support of this conclusion is as follows:

(a) *Motor Police Survey*

The Pennsylvania Motor Police conducted a traffic count along State highways over which limbs of trees extended. This count was taken on a high-crowned macadam road, a narrow concrete road, and a wide concrete road. The results as reported in the testimony (R. 242a-269a) show the following percentages of the various types of cars which operated on the wrong side of the road at the points where the patrolmen were stationed:

Ordinary commercial vehicles—5.63%
Empty haulaways—2.17%
Loaded haulaways—65.62%

(b) *Testimony of Drivers*

Lester Mellinger testified that he drove on the wrong side of the road to miss the low overhanging limbs (R. 236a, 237a). Patrolman M. F. Wilhere also testified as to this operation since he observed Mr. Mellinger driving on the wrong side of the road (R. 238a).

Alfred Baxter testified that it was necessary to drive on the wrong side of the road to miss overhanging obstructions (R. 337a). He also frequently saw other drivers of haulaways on the wrong side of the road.

Harry Edwards testified that he drove on the wrong side of the road to avoid overhead obstructions (R. 345a).

Drivers Edwards and Baxter stated that they gave the overhead obstructions wide berth to give themselves the benefit of any doubt (R. 337a, 345a).

Appellants have inferred (brief, p. 59) that there is some obligation on the Department of Highways to provide vertical clearance allowed by law. But section 902 (b) of The Vehicle Code (75 PS §452) expressly states that nothing in the provisions of the law relating to sizes of vehicles shall be construed to require public authorities to provide sufficient vertical clearance to permit the operation of such vehicles. A study of the testimony herein referred to indicates that loaded haulaways must be driven to the wrong side of the road in order to prevent limbs from scratching the paint of the automobile over the cab, whereas ordinary commercial vehicles will not be seriously damaged by brushing against branches of trees. The operation of vehicles upon the right side of the highway is required not only by section 1004 of The Pennsylvania Vehicle Code (75 PS §521) but also by the safety requirements promulgated by the Interstate Commerce Commission (R. 525a-38).

5. Tendency for Car-Over-Cab to Fly Off

The Supreme Court of Pennsylvania made the following finding of fact concerning the strength of the chains and structure of car-over-cab equipment, the force to be anticipated thereon, and the probable behavior of the car over the cab in the event of collision: "**The chains used to anchor the automobile over the cab, and the supporting structure, are insufficient to resist the force transmitted in the event of collision, with the result that the automobile be-**

comes detached and falls off the carrier vehicle." (R. 628).

This finding affirms findings of fact, Nos. 24 and 25 of the trial court (R. 484a), and is adequately supported by the testimony.

Plaintiffs testified that M. & G. equipment was anchored by four chains (R. 45a), three-eighths of an inch in size, looped over the axle (R. 51a), and introduced Plaintiffs' Exhibit No. 4, being a sample of such chain (R. 64a). However, the calculation of Professor Ulmann shows that if such vehicle stopped within ten feet at twenty-five miles per hour, there is stored in the car over the cab 7,520 foot-pounds (R. 379a), and at forty miles per hour 19,300 foot-pounds (R. 381a); under this latter condition four chains like Exhibit No. 4 will not hold (R. 381a), and under the conditions at twenty-five miles per hour, these chains would hold only if in tension. He stated that tension rigging is better than the chains such as the plaintiffs used. Professor Ulmann also testified, concerning the additional force stored in the car over the cab (R. 381a), resulting in the tendency for the automobile over the cab to become detached and to fly off in the event of a collision. Professor Ulmann also stated that the bulk in the mass of the car over the cab is unsafe, especially since it rests on wheels (R. 404a). Further proof of the tendency of the car over the cab to become detached is furnished in the accidents wherein this very thing occurred. (Discussed at pp. 31-40 of this brief).

Concerning the danger to the supporting structure, the following testimony is pertinent:

Lynn M. Francis, plaintiffs' witness, testified that the tensile strength of the steel used for the runways was 100,000 pounds per square inch, and that used for the side supports was 60,000 pounds (R. 147a, 148a). He further testified that there is no insulation against vibration, and that cracks sometimes develop in the steel (R. 156a).

Dr. King testified that welding weakens the frame (R. 319a), as did Mr. Judd (R. 459a), and that bolting also weakens the frame (R. 320a, 321a).

Concerning rewelds, Sergeant Shuler testified that he observed rewelds in Reeser's yard on the runways and the supports (R. 432a, 433a). Exhibit P (R. 591a) also shows rewelds of this nature in the side supports.

Professor Ulmann testified that if the chains hold in the event of collision the force in the car over the cab is transmitted to the structure (R. 381a). Concerning Exhibit O (R. 590a) he testified that behavior in the event of stress is problematical (R. 386a). As to saddles in the runway, he testified that they would give little resistance in the case of sudden impacts (R. 399a), and the car over the cab could easily mount them (R. 399a). This testimony was in connection with Exhibit T (R. 595a), which he stated was of unsound construction.

6. Accidents Involving Car Over Cab Have Happened

The Supreme Court of Pennsylvania made the following statement concerning accidents involving the car-over-cab equipment:

> Evidence was also produced at the hearing, of accidents in which this type of equipment was involved, from which it appeared that the transported automobile in such instances became dislodged and personal injuries and property damage resulted. (R. 682).

Because of the importance of these accidents, we shall discuss separately the findings of the trial court thereon.

(a) *New York City accident*

Concerning this accident, the trial court made the following finding of fact:

> **26. On May 16, 1934, there was a collision in New York City in which the automobile over the cab of a haulaway became detached and damaged the vehicle with which it collided and injured the operator thereof.** (R. 484a)

The testimony shows that on May 16, 1934, at the intersection of the south side of One Hundred Forty-Fourth Street and Broadway, there was a collision between the Buick of Anton Von Hoff and a convoy carrying a car over the cab.

Exhibit D (R. 579a), being a picture of the accident, was introduced and identified by Joseph Vizian, the New York City patrolman shown on the picture (R. 210a, 212a). Officer Vizian testified, as the picture shows, that on the bottom is the Buick, and that the car on top of it was the car over the cab; that all the cars on the convoy were detached (R. 211a).

Mr. Von Hoff, the owner of the Buick, also testified as to the accident and identified Exhibit D. He testified that his car was damaged because the car over the cab caved in the roof (R. 308a).

The photograph of this accident is printed at page 35 of this brief. It shows the automobile of Mr. Von Hoff lying on its side in the extreme left corner of the picture (Exhibit D).

(b) *Mt. Pocono accident*

The trial court found as follows concerning this accident:

> **27. On June 23, 1937 there was a haulaway involved in an accident north of Mt. Pocono, which resulted in the automobile partially over the cab becoming detached.** (R. 484a)

The testimony shows that this was an accident involving a convoy of the Auto Forwarding Company and a Ford ice truck of Joseph J. De Santo. The accident occurred June 23, 1937, one-fourth of a mile north of Mt. Pocono, on Route No. 611, Monroe County. The ice truck made a left turn and the convoy, following in an effort to avoid the collision, veered to the right of the road and the ditch. The impact caused the two Packards on the upper deck of the equipment to fly off and light in the ditch. The front car on the upper deck was partly over the cab. Mr. De Santo, the driver of the ice truck (R. 269a to 272a) and Patrolman Tama, who investigated the accident (R. 280a to 283a), testified concerning the facts of this accident.

(c) *Tobyhanna accident*

The trial court found as a fact concerning this accident as follows:

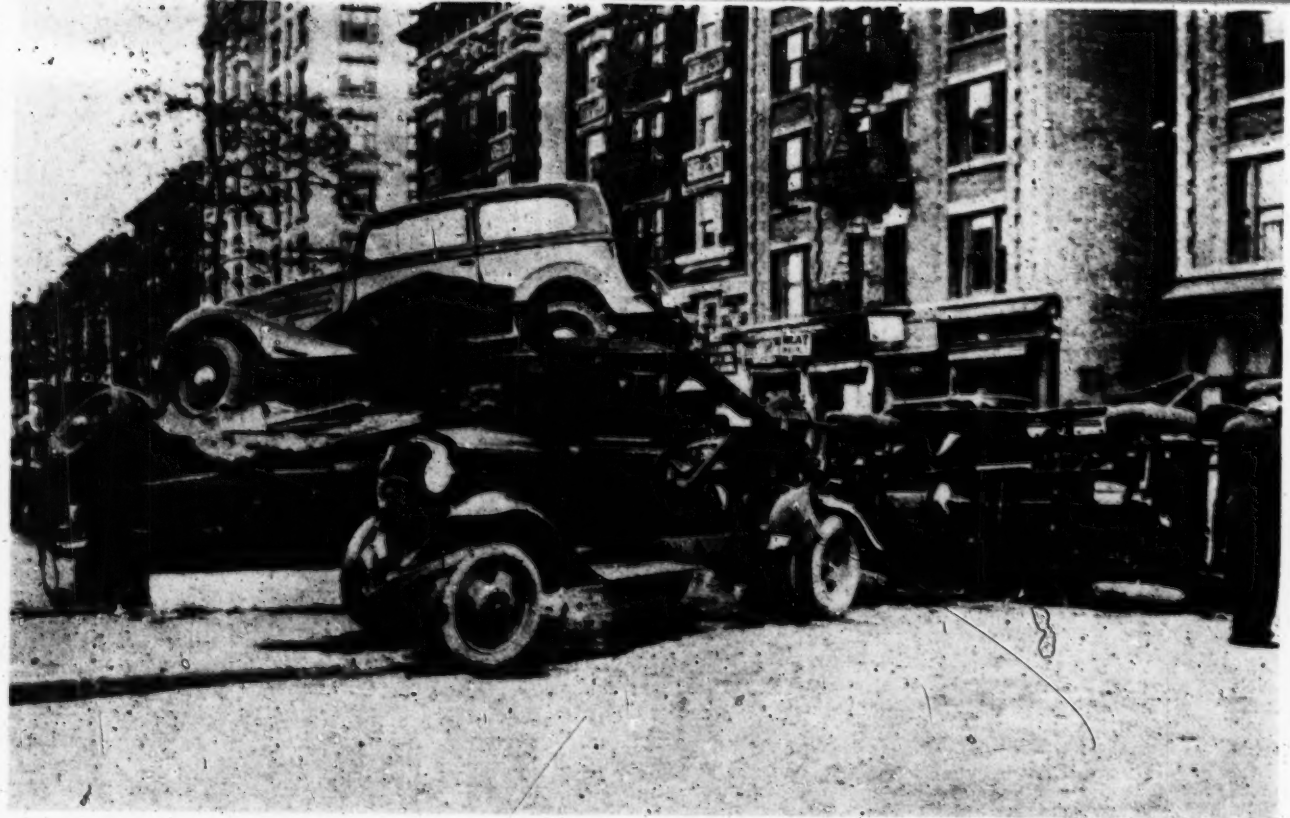
> **28. On August 17, 1937, near Tobyhanna, a haulaway was involved in an accident, as a result of which the automobile over the cab became partially detached.** (R. 484a)

The testimony shows that on August 17, 1937, on Route No. 611, Monroe Township, approximately three miles west of Tobyhanna, an auto carrier was involved in an accident as a result of which the car over the cab became partially detached.

Photographs of the scene of the accident taken by the Secretary of the Lackawanna Motor Club were introduced into evidence (R. 284a, 285a). These were marked Defendants' Exhibits V, W and X (R. 597a).

The convoy was traveling toward New York on the straightaway pictured. Due to the presence of parked cars and Department of Highway workers, the auto carrier was unable to come to the sudden stop required, and, as a result, he pulled off the highway, finally striking the large boulder, which broke the front wheel causing the convoy to stop. The front chain holding the car over the cab was snapped, and this car went forward approximately three feet to the right of the tracks and rested on the cab (R. 286a).

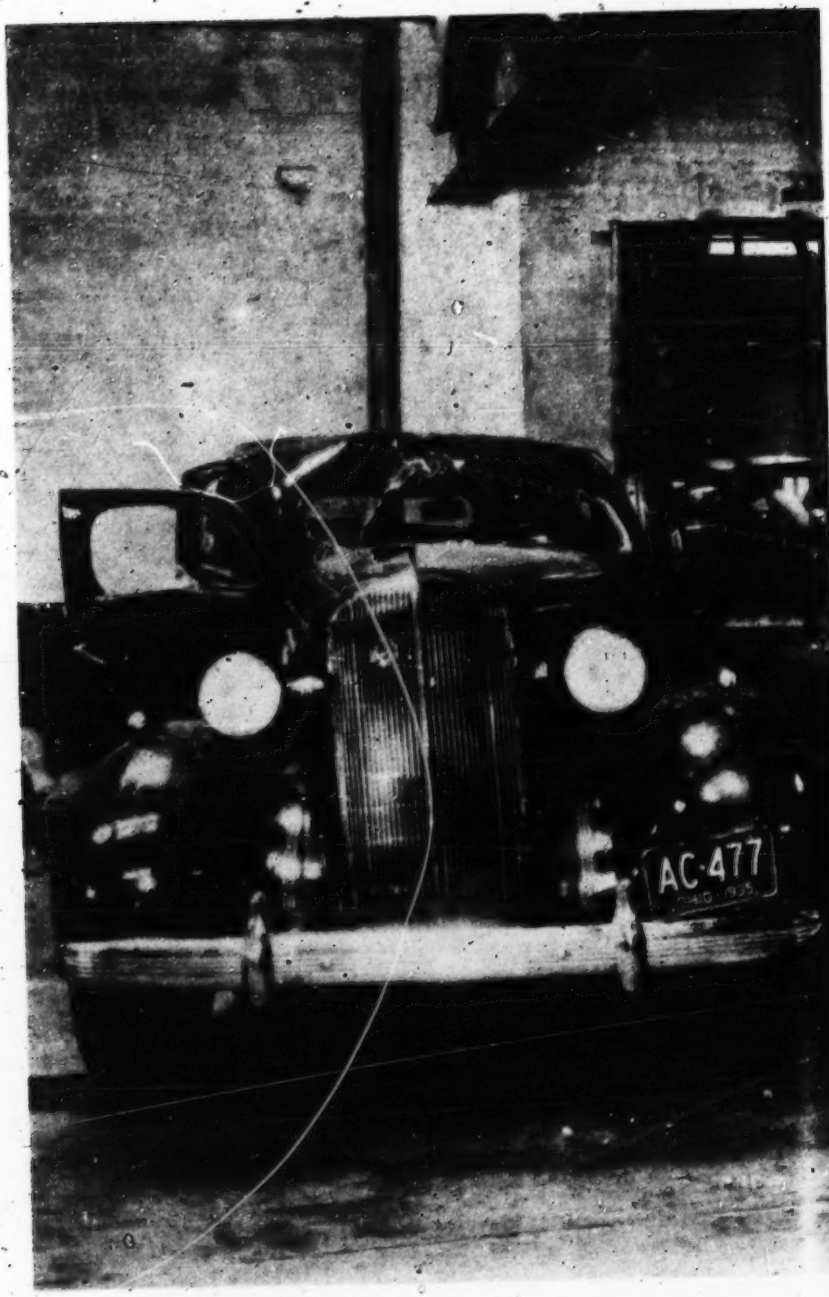
Officer Tama expressed the opinion that the car over the cab lessened the operator's control, and, in that way, contributed to the accident (R. 289a).



This is a photograph of the accident in New York City, concerning which the trial court below made a specific finding of fact (R. 484a). Note car over cab resting on other vehicle with which the truck had collided.

Defendants' Exhibit D (R. 579a)

Defendants' Exhibit Y (R. 598a)



This is a photograph of the Buick involved in the accident near ... The occupant of this car was killed as a result of the collision with the ... shown on the opposite page.

This is a photograph of the convoy which collided with the Buick shown on opposite page. This convoy was loaded with a car over the cab at the time of the accident.

Defendants' Exhibit CC (R. 602a)

(d) *Erie accident.*

The trial court found as follows:

> **29. On February 14, 1936 there was a collision near Erie in which the automobile over the cab became partially detached and damaged the automobile with which the haulaway collided, as a result of which collision the operator of the other car received fatal injuries.** (R. 484a)

The testimony in support of this finding shows that on February 14, 1936, on Route No. 20, 12 miles west of Erie, there was a collision between a Buick and a convoy. Photographs of the scene of the accident (Exhibit BB) (R. 601a), of the convoy (Exhibit AA), (R. 600a), and of the Buick (Exhibits Y, R. 598a, and Z, R. 599a), were identified by the photographer, Frank Shauble (R. 290a, 291a).

Paul W. Danielson, a gas station operator, identified the scene of the accident and the circumstances surrounding it (R. 292a-303a). Patrolman Blythe, who investigated this accident, identified the photographs (R. 428a-431a). The occupant of the Buick was killed, and the car over the cab of the convoy was found resting on the roof of the Buick, with which it had collided.

Exhibit AA and Exhibit Y are printed in this brief at pages 36 and 37. From these photographs it is clear what effect the convoy's superstructure had upon the Buick in which the deceased was riding. The type of superstructure of the convoy shown in Exhibit AA should also be noted.

(e) *Scranton accident.*

The trial court found as a fact as follows:

> **30. On September 22, 1934, near Scranton, an operator of a haulaway lost control, as a result of which the automobile over the cab became completely detached and flew off.** (R. 484a).

The testimony shows that on or about September 22, 1934, at the foot of Morgan Hill, North Scranton, a convoy lost control and was wrecked as shown by photograph in evidence as Exhibit CC (R. 602a), and identified by the photographer Harry Baroff (R. 304a, 305a).

John J. Norton, an eyewitness, explained that the car over the cab flew off and further identified the photograph (R. 305a, 307a).

The photograph of this accident is printed at page 38 of this brief, being Exhibit CC.

(f) *Longwood Gardens accident.*

The trial court found as follows:

> **31. On December 18, 1936, in Chester County, in a collision between a haulaway and another automobile the automobile on the upper deck of the haulaway flew off.** (R. 485a)

On December 18, 1936, at anvil intersection of Route No. 1 and State Highway No. 52 in Chester County, there was an accident between a convoy and a Pontiac sedan. Russell Brewer, who lives at the intersection, testified that the car on the upper deck of the tank type equipment flew off (R. 312a-314a).

Appellants have attempted to minimize the effect of the foregoing accidents introduced into evidence by appellees, apparently on the theory that the Commonwealth should have been able to produce testimony of many more accidents (appellants' brief, pp. 49, 51). However, the appellants have entirely overlooked the burden of proof imposed by law upon them before the trial court, together with the express disclaimer by the Commonwealth from assuming such burden of proof by the introduction of evidence (R. 213a). There was no duty upon the Commonwealth to introduce into evidence before the trial court cumulative records of all accidents involving car-over-cab equipment. If the Commonwealth's counsel had seen fit to introduce no testimony of accidents in defense of the statute under consideration, appellants would undoubtedly have argued that this absence of evidence for the Commonwealth proved that there had been no accidents in Pennsylvania.

Therefore, we submit that the appellants can derive no comfort from the testimony which the Commonwealth did not introduce into evidence before the trial court, and the appellants' position on this point is obviously fallacious, naive and absurd.

7. Most of Plaintiffs' Testimony Incompetent

At the hearing before the trial court, plaintiffs offered into evidence numerous statistics and records as to the safety of their equipment, which were received subject to defendants' objections. The trial court did not rule upon these objections to the admissibility of plaintiffs' evidence, because it was not necessary to do so for the proper disposition of this case.

However, appellants attempt to rely upon this objectionable testimony to urge before this court that the car-over-cab equipment is safer than ordinary commercial vehicles (appellants' brief, pp. 51-62). Therefore, we feel obliged to point out to this court the objectionable features to the evidence upon which appellants are here attempting to rely.

All of these accident records were hearsay testimony and violated the hearsay rule. In no case was any person present who could be thoroughly cross-examined as to the accuracy of such records. Therefore, this testimony was inadmissible and the court correctly gave it little weight.

Moreover, this testimony was clearly incompetent, as the following summary will show:

(a). *Testimony That Car Over Cab Did Not Contribute to Accident*

Although several witnesses for the plaintiffs testified that they could not attribute any accident of their respective companies to the presence of the car over the cab, none of them, on direct examination, indicated what was meant by an accident involving a car over the cab. However, on cross-examination, they testified as follows:

Mr. Lawrence indicated that the type of accident that he had in mind which would be caused by the car over the cab was a vehicle rounding a curve and going off the road, as a result of the tipover (R. 75a, 76a). Mr. Thompson testified that he meant a type of accident in which the tractor struck another vehicle and the car over the cab became dislodged to such an extent that additional injury would be caused

thereby; he could think of no other type (R. 126a). Mr. Boutell, when cross-examined as to what type of accident he had in mind by the car being over the cab, stated that he couldn't conceive of any type of accident which would involve the car over the cab (R. 173a).

In the light of these admissions, the testimony that the car over the cab did not contribute to accidents is meaningless.

(b) *Accident Figures Not Limited to Pennsylvania*

Commonwealth's counsel consistently objected to the admission of accident records which were introduced on behalf of plaintiffs, and we now renew our objection to their consideration by this court. The figures presented by Mr. Mordan, for M. & G. (R. 59a), by Mr. Thompson, for the six mysterious Michigan concerns, and the National Safety Council figures (R. 125a), by Mr. Lawrence for United States Truck Lines (R. 78a), and by Maurer and Myers (cf. 95a), were not broken down as to Pennsylvania. Such figures are, therefore, invalid for the purpose of determining whether the haulaway business is safer than normal trucking operations in that state.

We particularly wish to call the attention of this court to the fact that the National Safety Council records were not prepared by any witness present in court, and that they are not comparable to the other figures presented because the same basis of time, locality, etc., could not have been used (R. 122a).

(c) *No Assurance That All Accidents Reported*

M. & G. gives its drivers a bonus for not having accidents (R. 43a). U. S. Truck Lines admitted one

instance where a driver did not report an accident (R. 73a). Mr. Thompson, for the Michigan concerns, admitted the bare possibility that all accidents may not be reported (R. 116a, 117a), and indicated that something in lieu of bonuses is awarded (R. 122a).

(d) *Other Facts Concerning Competency of Statistics*

The drivers of the reporting concerns were more carefully selected than usual (R. 72a, 77a, 116a, 123a). To the same effect see the testimony of driver Costa (R. 437a). (Incidentally, the testimony of Mr. Costa is of doubtful veracity, since it indicates that, over a period of four years, he had driven five hundred thousand miles, which, on the basis of six days a week, fifty weeks a year, amounts to the amazing figure of over four hundred miles per day. We believe that it is impossible for any man to drive a haulaway four hundred miles per day for four years.)

The figures submitted for U. S. Truck Lines were not acceptable, because: (a) They include empty and loaded haulaways (R. 76a); (b) This concern is not an intervenor; (c) Figures include Kentucky and Illinois operations (R. 78a), where special types of equipment are used (R. 74a); (d) Mr. Lawrence is not a safety expert (R. 73a), and did not have personal knowledge of the figures collected. The figures of two other concerns included empty and loaded haulaways (R. 174a, 47a).

(e) *Evidence Concerning Insurance Rates Misleading*

Appellants also state that "Responsible insurance men also testified that the rates for car carriers were lower than the rates for other trucking" (appellants' brief, p. 52).

However, plaintiffs presented the testimony of only one insurance company to support allegations in the bill in equity that insurance rates were lower as to the haulaway business. This testimony concerned Auto Mutual Indemnity Company, and was so inaccurate as to constitute an attempt by the witness to deceive the trial court, as the following analysis will demonstrate.

Although interstate carriers must be insured in the states through which they pass (R. 426a, and I. C. C. requirements), nevertheless the Auto Mutual Indemnity Company is not licensed to do business in Pennsylvania (R. 425a), and was not so licensed when its representative testified in this case. In spite of this loss of license, he testified in effect that his company could insure the present appellants in Pennsylvania (R. 192a). He also stated that he was not sure of the difference between ordinary commercial rates and convoy coverage (R. 191a), and that the convoys insured are selected (R. 192a). This is an example of the "responsible" insurance testimony referred to by appellants.

Additional testimony was offered by D. F. Burkhardt, an insurance agent of Cleveland, who admitted that new equipment would be a factor in the rates (R. 194a), and that **he knew a number of insurance companies which formerly wrote the auto hauler business, and which have now discontinued it** (R. 194a). This latter circumstance is good evidence to establish the fact that insurance companies have found the writing of the haulaway business unprofitable.

At least one concern for which statistics were offered by the plaintiffs is self-insured (R. 70a), which

is also a commentary upon the availability of low-priced insurance.

In view of these and many other discrepancies in the plaintiffs' evidence, we submit that most of the testimony offered on behalf of plaintiffs and the intervenors is inconclusive, incomplete, incompetent, or irrelevant, and, therefore, inadmissible.

8. Summary of Findings That Car Over Cab Unsafe

The numerous findings of fact by the Supreme Court of Pennsylvania and the trial court, and the testimony in support thereof, may be summarized as follows:

a. The additional **height** caused by the presence of the car over the cab so raises the center of gravity of the vehicle as to make its operation unsafe, particularly on curves of the type found in Pennsylvania.

b. Likewise, the car over the cab causes excess **weight** on the front wheels of the truck-tractor which so affects the steering, braking, headlights, front tires, front axles, and the balance of the haulaway unit as to make its operation unsafe.

c. The car over the cab and the **size** and location of the runways and vertical supports in connection therewith seriously impair the vision of the operator of the haulaway, and also result in such haulaway being operated on the wrong side of the **road**.

d. In the event of serious collision, there is a tendency either for the car over the cab to fly off for the force therein to be transmitted to the supporting struc-

ture, all of which is dangerous to the operator of the haulaway and to the traveling public.

e. There have been accidents involving haulaways in which the car over the cab became partially or totally detached, resulting in personal injury and property damage.

These facts, and others too detailed to mention here, clearly establish that haulaways coming under the provisions of section 1033 (e) are unsafe to the operator thereof and to the general public. The testimony also establishes beyond any doubt that section 1033 (e) must be considered as a size and weight regulation enacted for the protection and safety of the highways of the Commonwealth.

In view of the right of the Commonwealth to control the use of its highways, and to say how vehicles shall be operated thereon, there can be little doubt that section 1033 (e), as a legitimate safety measure, is a valid exercise of the police power.

D. Section 1033(e) Does Not Seriously Affect Appellants' Business

The damaging effect which section 1033 (e) is alleged to have upon the haulaway business (appellants' brief, p. 60) is greatly exaggerated. From the testimony, it appears that the haulaway business will be affected only incidentally, and not in any manner sufficient to be termed a taking of property without due process of law. Plaintiffs have failed to make out a case of any such taking or unwarranted interference, even if it be assumed, for purposes of argument, that the statute was not otherwise valid. The defendants' contention in this respect is supported by the following references to testimony:

1. MUCH OF PRESENT EQUIPMENT DOES CONFORM WITH LAW

Five models on Plaintiffs' Exhibit 3G (R. 532a) at present have the fifth wheel over or ahead of rear axle (R. 420a), thus making it possible to remove the car over the cab without disturbing the balance of the combination vehicle.

Mr. Francis, a manufacturer, testified for the plaintiffs that his company is engaged in the manufacture of the models shown on Exhibits 3E (R. 530a), and 3F (R. 531a) mostly (R. 152a); on model 3F no part of the car is over the cab, and on model 3E a very small portion might conceivably be over the cab. Exhibit 3F is not under the present law (R. 130a).

Ten [Two] of Maurer & Myers' equipment not affected by the law (R. 92a, 104a).

Mr. Lawrence testified that some of the U. S. Truck Lines' equipment could be used without the car over the cab (R. 74a).

Mr. Boutell admitted that, except for the question of anchoring and economic reasons, he knew of no reason why Plaintiffs' Exhibit No. 15 could not be used to carry three cars without the car extending over the cab, rather than four cars, as is done in the equipment pictured.

None of the M. & G. equipment over 40 feet can conform to the Ohio law at present (R. 40a, 50a), and Mr. Francis admitted that the laws of other states limit the length of haulaway equipment to 40 feet, although the longer equipment was legal in Pennsylvania (R. 150a). Thus, the necessity for having the car over the cab results from the restriction on lengths imposed

by neighboring states, and not because of any requirements of engineering or construction.

2. No Effort Has Been Made to Make Over the Nonconforming Equipment so as to Conform with the Present Law

The trial court found as a fact that no attempt had been made to reconstruct plaintiffs' equipment so as to conform to section 1033 (c), as follows:

> **32. No attempt has been made to reconstruct the present nonconforming equipment so as to conform with the act complained of, and nonconforming equipment has been purchased since the act became effective.** (R. 485a)

Several plaintiffs admitted that no such attempts to reconstruct the present nonconforming equipment had been made, i. e., M. & G. (R. 572a); Reeser (R. 87a, 90a); Maurer and Myers (R. 98a, 99a); Boutell (R. 172a); Professor Ulmann testified that the fifth wheel could be moved forward (R. 391a), which is the usual (R. 413a), and the best (R. 412a) place. Similarly, Mr. Mordan, for M. & G., admitted that there is no up-pull on the front after the fifth wheel is moved sufficiently forward (R. 59a).

Both U. S. Truck Lines and Maurer and Myers bought equipment since the effective date of the act involved in the present case (R. 81a, 82a, 101a, 102a); the latter concern purchases new cars each year (R. 106a).

3. Valuation of Present Equipment Improperly Computed

For example, considering the value of M. & G. Convoy, Inc., this valuation was not computed as if it included conforming equipment which would be purchased to replace obsolescent equipment (R. 51a); none of the equipment was five years old (R. 52a); trucks were depreciated on the basis of one-third, and trailers one-fourth per annum (R. 52a); most of the equipment was not less than one year old (R. 52a), particularly the models shown on Exhibit 3D (R. 53a). The models shown on 3GA5 were three years old (R. 53a). All tractors less than two years old (R. 53a). From these figures it appears that the equipment of this concern was completely replaced every three or four years; in view of the present age of the equipment, the Pennsylvania statute could not seriously affect the value of the business, even though the equipment were completely outlawed (which it was not).

No allowance was made for trade-in or disposal value of equipment (R. 55a). Mr. Mordan testified that his business was worth $700,000.00 (R. 54a), his equipment was **more** than **one-half** of the total assets of the company (R. 40a), and that the actual value of such equipment was $270,000.00 (R. 39a); simple mathematics shows the wanton disregard of accuracy in this connection.

4. Equipment Hauling Three Cars Being Used Today

Some concerns have three-car haulers, such as Maurer and Myers, which has four of them (R. 92a),

and Eastern Automobile Forwarding Company, which has six (R. 207a).

This fact demonstrates that the appellants and other operators affected by the Pennsylvania act can operate economically with three-car equipment, even though the act requires the removal of the fourth car from over the cab of the tractor.

5. Employes Not Reduced by Act

As to employes, Mr. Mordan admitted that it would take no fewer employes on three-car equipment and no fewer employes to carry on the driveaway business (R. 111a). Since he is partly engaged in the driveaway business, and since this would be the business to which haulaway concerns would turn if they were put out of business entirely, appellees contend that this disproves plaintiffs' allegation that their employes will suffer.

From the above analysis of the testimony, it is clear that appellants have failed to meet their burden of proving a substantial interference with their business by section 1033 (c). What evidence has been presented is inaccurate and exaggerates actual conditions. The fact that much of the present-day equipment conforms with the law, and that appellants today are using three-car haulers, would indicate that there is little basis for complaint, particularly since equipment is depreciated so rapidly as to cause a quick turnover in inventories of equipment. The fact that plaintiffs have unanimously failed or refused to attempt to comply with the law indicates a fear that such attempts might have proven successful and caused them to go to the slight inconvenience of altering their equipment to this extent.

In view of the authorities heretofore and hereafter cited, it is clear that this court cannot set aside section 1033 (c) as violative of the Due Process Clause, because it is a legitimate exercise of the police power of the State, and there is no substantial taking.

E. Section 1033(c) Not Invalid under Equal Protection Clause

The appellants attacked the constitutionality of section 1033(c) under the equal protection clause of the fourteenth amendment, both before the trial court and the Supreme Court of Pennsylvania. Both courts overruled appellants' contentions (R. 498a, 686). The Supreme Court of Pennsylvania relied upon the following decisions of this court: PATSONE *v.* COMMONWEALTH OF PENNSYLVANIA, 232 U. S. 138; KEOKEE CONSOLIDATED COKE CO. *v.* TAYLOR, 232 U. S. 224; CLARK *v.* PAUL GRAY, INC., et al., supra, (306 U. S. 583).

Appellants have not included in their specification of errors (brief, p. 10) any reference to the equal protection Clause of the United States Constitution. Consequently, we assume that the appellants have abandoned this contention, and, accordingly, we shall make no further argument under this heading.

F. Plaintiffs Did Not Meet Burden of Proof

It is axiomatic that a presumption of the constitutionality attaches to each state statute: ALASKA PACKERS ASSOCIATION *v.* INDUSTRIAL ACCIDENT COMMISSION, 294 U. S. 532. Many other cases could be cited to show that the presumption of constitutionality imposes a burden of proof upon those claiming that a statute is unconstitutional.

As pointed out supra, this court will endeavor to ascertain upon the whole record whether it is possible to say that the legislative choice [by the state legislature] is without rational basis: SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNELL BROS., supra (303 U. S. 177); CLARK *v.* PAUL GRAY, INC., supra, (306 U. S. 583).

Appellants have not only failed to show that the Pennsylvania statute is without rational basis, but have likewise failed to make out even a prima facie case of unconstitutionality.

Even if it be assumed that all of plaintiffs' evidence was valid, probative, and admissible, and assuming that testimony offered on behalf of the Commonwealth had no probative or evidentiary value, nevertheless, this court would be required to find that section 1033 (c) was constitutional, because plaintiffs have failed to produce evidence showing conditions throughout Pennsylvania and in the haulaway business generally.

For example, plaintiffs presented evidence as to the construction of two makes of trailers, e. g., Francis and W. and K. however, Defendants' Exhibit HH, introduced into evidence (355a), shows that many other types of trailers are used by the plaintiffs and intervenors in the present case. Some of these trailers are home-made (R. 440a).

Plaintiffs are in the peculiar position of having produced testimony showing the care and skill that goes into the manufacture of haulaways and admitting, on the other hand, that many of such haulaways are home-made (R. 440a), presumably without the benefit of such skill and care as is used by the com-

panies manufacturing trailers. Since the balance of the haulaways seems to depend upon the length of the lever arm behind the rear axle of the truck-tractor connecting the fifth wheel with the trailer, it would seem that the balance would be affected by the variation of the lever arm. From the testimony of experts this length appears to vary in almost every case. Certainly, it does not make for safety to allow the balance of a vehicle to depend upon such variable factors as the length of the lever arm, the weights of the automobiles carried, and the skill used in construction.

It is hornbook law that the legislature, in the exercise of the State's police power, has the right to remedy evils and to protect public safety, after making an investigation of conditions generally, and the mere fact that such regulations might work a hardship on a few does not in any way detract from the power of the State Legislature to act. The following cases will serve to illustrate this point: PEOPLE *v.* ELERDING, 254 Ill. 579, 98 N. E. 982. (1912), construing an Illinois statute prohibiting employment of females in hotels for more than ten hours per day; SEMLER *v.* OREGON STATE BOARD OF DENTAL EXAMINERS, 294 U. S. 608, 1086 (1935), construing an Oregon statute revoking the licenses of dentists who advertise professional superiority, and PIERCE OIL CORPORATION *v.* CITY OF HOPE, 248 U. S. 498, (1919), construing a municipal ordinance forbidding the storage of oil within three hundred feet of any dwelling. In the last case Mr. Justice Holmes said (p. 500):

> *** * * If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be**

enough to invalidate it or to remove such an object from its grasp. * * *

How did the plaintiffs attempt to prove this act unconstitutional? They introduced evidence only concerning the three plaintiffs and a couple of intervenors, and the trailers of only 2 manufacturers. The testimony as to accident records was carefully selected and included, besides the three plaintiffs, two large concerns outside of Pennsylvania which are not even intervenors in the present case. Plaintiffs presented two drivers with good records, both of whom were careless with the truth, as pointed out supra. **No attempt whatever was made to show the accident record of the haulaway business in Pennsylvania generally.** None of the concerns for whom statistics were presented were the concerns which were involved in the six accidents introduced by the defendants into evidence. Practically all of plaintiffs' evidence was incompetent.

In view of the well-established principles of law, and the procedure adopted by plaintiffs in the present case, and the presumption of constitutionality, there can be no doubt that plaintiffs failed to meet their burden of proving the act unconstitutional.

II.

THE PENNSYLVANIA STATUTE IS NOT SUPERSEDED BY THE MOTOR CARRIER ACT, 1935, NOR BY ANY REQUIREMENTS OR REPORTS OF THE INTERSTATE COMMERCE COMMISSION

In division I of their brief (pp. 11-41) appellants contend that the state statute has been superseded by the Motor Carrier Act, 1935 (49 U. S. C. A. §§301-327) and by action of the Interstate Commerce Commission taken pursuant thereto. We shall in this division of our brief demonstrate that appellants are mistaken, for any one of the various reasons following.

A. The State Statute Is a Regulation of the Size and Weight of a Particular Class of Vehicles

The Pennsylvania act is plainly a "regulation of the size and weight of motor vehicles and combinations of motor vehicles."* As such it can not be superseded by reason of anything in the Motor Carrier Act, 1935, or any action of the Commission, unless as provided in section 225 (49 U. S. C. 325), which is the following:

> Sec. 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and

* Contrary to the statement in appellants' brief (p. 28) this point was made and pressed by appellees in both courts below. It was argued in appellees' brief in the Supreme Court of Pennsylvania, pp. 77-87.

> maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization or motor carriers having special knowledge of any such matter.

All of the courts which have considered this question have held that the Motor Carrier Act does not supersede state laws regulating size and weight of motor vehicles, in the absence of the action contemplated by section 225. L. & L. FREIGHT LINES *v.* RAILROAD COMMISSION, 17 F. Supp. 13 (1936); BARNWELL BROS. *v.* SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, 17 F. Supp. 803 (1937), (reversed on other grounds, 303 U. S. 177); WERNER TRANSPORTATION CO. *v.* HUGHES, 19 F. Supp. 425 (1937); HOUSTON & NORTH TEXAS FREIGHT LINES *v.* PHARES, 19 F. Supp. 420 (1937); STATE EX REL. DANIEL *v.* JOHN P. NUTT CO., 180 S. C. 19, 185 S. E. 25 (writ of certiorari denied in 297 U. S. 724) (1935); WHITNEY *v.* FIFE, 270 Ky. 434, 109 S. W. (2d) 832 (1937); MORRISON *v.* STATE, 133 Tex. Cr. App. 141, 109 S. W. (2d) 205 (1937); YELLOW CAB TRANSIT CO., INC. *v.* TUCK, 115 S. W. (2d) 455 (Tex. Civ. App. 1938). The principle expressed in these cases is sustained by the holding in H. P. WELCH CO. *v.* NEW HAMPSHIRE, 306 U. S. 79 (1939); and, it seems to us, was tacitly recognized in SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., 303 U. S. 177 (1938). No action described in section 225 has been taken by the Commission.

The Pennsylvania act is a regulation of size and weight. It controls the size and weight of a certain

highly specialized class of vehicles. As the first step in making this clear, we set out below the complete original statute, of which only subsection (c) was attacked (section 1033, Act No. 447, approved June 29, 1937 P. L. 2329, 75 PS §642):

"Section 1033. (a) No person shall operate a vehicle on the highways of this Commonwealth having two levels for the carriage of other vehicles.

(b) No person shall operate a vehicle on the highways of this Commonwealth carrying other vehicles, any part of which is carried at a height of more than one hundred and fifteen (115) inches above the ground.

(c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle.

(d) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any axle of which is more than three (3) feet higher than any other axle on such carrier vehicle."*

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* West Virginia has recently enacted a similar statute (Chapter 88, Acts of the West Virginia Legislature, 1939), as follows:

1. On and after July first, one thousand nine hundred forty, it shall be unlawful for any person to operate on the highways of this State:

(a) A vehicle having two levels, for the carriage of other vehicles;

(b) A vehicle carrying other vehicles, any of which is carried at a height of one hundred fifteen inches above the ground;

(c) A vehicle carrying other vehicles, any part of which is above

The 1939 General Assembly changed subsection (c) to read as follows (Act No. 400, approved June 27, 1939, P. L. 1135):

> (c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle the weight of which is directly above the cab of the carrier vehicle or directly over the head of the operator of such carrier vehicle.

The original subsection (c) became effective June 29, 1937 (R. 679), and the substituted subsection on September 1, 1939 (R. 693). Subsections (a), (b), and (d) do not now become effective until January 1, 1942.

This act on its face is a plain regulation of size and weight, but any doubt that might arise on that point is dispelled by the evidence and the findings of both courts below, discussed supra, showing that the act does establish necessary regulation of the size and weight of the vehicles to which it applies.

This is true both before and after subsection (c) was amended. So in either case the same considerations apply with respect to supersedure. In either case the act is a valid regulation of size and weight.

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the cab of the carrier vehicle, or over the head of the operator of such carrier vehicle.

(d) A vehicle carrying any other vehicle, any axle of which is more than three feet higher than any other axle on such carried vehicle.

(e) The provisions of this Act shall not apply to any vehicle transporting other vehicles used in construction or maintenance work or in the development of power, oil, natural gas or other minerals, or for agricultural purposes.

Any person violating any one of the provisions of this Act shall, upon conviction, be sentenced to pay a fine of twenty-five dollars and costs, or may be sentenced to jail for a period of not more than five days.

There is no supersedure under the authority of the first ten cases cited in this subdivision of our brief; and the act is otherwise clearly valid, SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., supra; CLARK *v.* PAUL GRAY, INC., 306 U. S. 583. All of the questions involved, either under the old or new subsection (c), have been settled in favor of validity by decisions of this court.

The conclusion that the act is a size and weight regulation appears not only from a consideration of the terms of the act, and the findings and evidence, now being discussed in this subdivision A (of part II of our brief), but is also supported when hereafter, in subdivision B, we consider the reports issued and requirements established by the Commission under the terms of section 204 of the Motor Carrier Act (49 USCA §304). We say this now so that it may be kept in mind during the entire discussion.

Laws of this character, to be valid, need not follow any set pattern, but may regulate the size and weight of motor vehicles in a variety of ways suitable to local needs. SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., supra; SPROLES *v.* BINFORD, 286 U. S. 374; MORRIS *v.* DUBY, 274 U. S. 135. And they need not regulate uniformly all classes of vehicles; they may classify vehicles and establish for them different kinds of regulation. In SPROLES *v.* BINFORD, supra, the Texas statute permitted some vehicles to carry 14,000 pounds of net load while limiting others to 7,000 pounds. As far as their effect on the highway and traffic was concerned they were, when loaded, different vehicles. This was sustained on familiar grounds of classification. Similarly, Pennsylvania has in this act

made a classification for purpose of weight and size regulation. The evidence, and the findings of the courts below, fully sustain it. CLARK *v.* PAUL GRAY, INC., supra.

In SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., supra, the law sustained, limited the width of motor vehicles to ninety inches and the weight, including the load, to 20,000 pounds, and provided that a combination of tractor and semitrailer should be considered one unit for purpose of weight regulation. In MORRIS *v.* DUBY, supra, a regulation of the Oregon Highway Commission, made pursuant to delegated authority, was sustained which, as to one particular much traveled highway, limited the combined weight of vehicle and load to 16,500 pounds, although on other roads gross loads of 22,000 pounds were permitted.

In the BARNWELL case it is recognized that states may, to suit their local needs, regulate the weight of vehicles on the basis of (1) gross load, or (2) axle or wheel load, or (3) net load; and that weight and size regulations relate to safety of operation as well as highway conservation.* One of the bases for sustaining the provisions of the South Carolina law making the gross weight limitation applicable to tractor-semitrailer combinations was the fact that the danger from the momentum of a colliding vehicle increases with the gross weight. The ninety-inch width limitation was sustained, although all other states have a ninety-six-inch width, among other reasons because of the tendency of wider vehicles

* Plainly, Section 225 of the Motor Carrier Act, 49 U. S. C. A. § 325, controls federal regulation of size and weight under all circumstances, whether for highway conservation, safety, or some other purpose BOTANY WORSTED MILLS *v.* UNITED STATES, 278 U. S. 282, 289.

to crowd other traffic and because increasing the dimensions of the vehicle obstructs the view of other users of the highway.

The evidence in the record and the findings expressed in the opinion of the Supreme Court of Pennsylvania plainly show that much of the reason for sustaining the act is found in the fact that it is, as to the vehicles within its scope, a direct regulation of their size and weight. It regulates their size and weight in many respects similar to the regulations sustained in the BARNWELL and other cases. Thus, the Supreme Court of Pennsylvania said (R. 681, 336 Pa. 17, 7 A. (2d) 466):

> At the hearing in the court below there was evidence on behalf of the Commonwealth to prove that the operation of a truck-tractor with car over cab, is dangerous and unsafe to the operator thereof and to the traveling public; that the hazards of highway travel are materially increased by the use of these vehicles upon the roads of the Commonwealth, as shown by testimony establishing the facts: (a) the automobile over the cab raises the center of gravity of the vehicle, resulting in making its operation difficult, particularly on the curves of the type to be found in Pennsylvania; (b) excess weight is placed upon the front wheels of the truck-tractor, thereby affecting detrimentally its steering, the action of its brakes and throwing its headlights out of focus, to the danger of oncoming traffic; (c) the extension of the carried automobile and the vertical framework supporting it over the cab of the truck-tractor obstruct the

vision of the operator, as well as that of drivers of overtaking vehicles; (d) overhead and lateral obstructions along the highway cause the truck-tractor to be operated upon the wrong side of the road, to avoid scratching and damage to the carried vehicle; (e) the chains used to anchor the automobile over the cab, and the supporting structure, are insufficient to resist the force transmitted in the event of collision, with the result that the automobile becomes detached and falls off the carrier vehicle.

Items (a), (b), (c) and (d) are plainly matters respecting the vertical distribution of weight, the horizontal distribution of weight or axle weight, the dimensions of the vehicle or load to be permitted over the cab, and the height of the vehicle and load.

The Supreme Court of Pennsylvania in two footnotes summarized the testimony of certain of appellees' witnesses as follows (R. 683a-684a):

> Among the witnesses called on behalf of defendants were Professor August Ulmann, Jr., a member of the faculty of the Towne Scientific School of the University of Pennsylvania, a mechanical engineer and physicist; and Dr. Henry F. King, an automotive engineer connected with the Massachusetts Institute of Technology, and also consulting engineer for some of the larger automobile companies. These witnesses, by calculations based upon actual measurements and study of the equipment used by plaintiffs, and by exhibits showing the formulae used in connec-

tion with the law of physics, whereby the center of gravity is determined, testified with respect to the technical questions involved whether the car over the cab causes excess weight on the front wheels, and detrimentally affects steering, braking, headlights, front tires, front axles, vision, and strength of chains used in anchoring the automobile over the cab. In their opinion such equipment is dangerous and unsafe.

Defendants also called Alfred Baxter, Harry Edwards and Leroy Marshall, who have been employed and have had experience as drivers of this type vehicle. Their testimony was to the effect that the vision of the operator thereof was obstructed; that the top-heavy weight over the cab interfered with steering and braking, particularly upon curves, because of the slow response of the steering gear, and the inside pull, with a resultant difficulty in straightening out after completion of curves.

The findings of fact of the trial court show that the act is directed to regulation of the size and weight of the vehicles included in its scope. See findings 14 to 23, R. 482a-483a.

These findings of both courts are sustained fully by the record (R. 315a-354a, 358a-422a, 242a-269a). See detailed discussion of these findings in Division I-C of this brief at pages 12-46.

We return now to a more detailed analysis of section 1033. Although appellants have attacked only para-

graph (c), nevertheless in determining the constitutionality of that one paragraph, it is not sufficient to consider that paragraph alone, but the act must be considered and construed as a whole. GREGG DYEING COMPANY *v.* QUERY, 286 U. S. 472, 479-480; HELVERING *v.* NEW YORK TRUST CO., 292 U. S. 455, 464. Any person assailing a statute or a part of it as unconstitutional must sustain one of two burdens: (1) He must show that the entire act is invalid; (2) Or he must show that the part he attacks, as related to all the rest of the act and its purpose, is invalid. GREGG DYEING COMPANY *v.* QUERY, supra. It must be presumed that the legislature intended paragraph (c) to be an integral part of the entire act, aiding the purpose of the other sections and the complete act.

Appellants have not undertaken either (1) to show that the entire act is invalid, or (2) to show that paragraph (c) is not valid solely as a necessary supplement to the rest of the act.

Viewing the act as a whole requires irresistibly the conclusion that it is a regulation of size and weight. And the legislative purpose in creating this particular size and weight law is to be ascertained by viewing the actual conditions on the highways, as revealed by the evidence, which led to its enactment. CLARK *v.* PAUL GRAY, INC., supra (306 U. S. 583, 593); CONTINENTAL BAKING CO. *v.* WOODRING, supra (286 U. S. 352, 373). The legislature must have seen a motor vehicle, or a combination of vehicles, consisting of a motor unit drawing a skeleton framework. On this skeleton framework were perched three or four large units each weighing 3000 pounds and upwards, each on wheels and highly mobile. Accidents had occurred and dangerous conditions of operation were created

(1) due to these units falling off the framework, (2) due to the overloading of the front axle by reason of the way the framework was constructed and the cargo carried over the cab, (3) due to the height on the framework at which the vehicles were carried, which raised dangerously the center of gravity, (4) due to the fact that highly polished automobiles were carried fully exposed and high up on the vehicle, necessitating or causing the driver to leave the right hand lane of travel to avoid objects that might inflict scratches or other damage upon the cargo.

The remedies, or at least partial remedies, which the legislature adopted to meet this condition were the obvious ones: (1) to reduce the height at which automobiles could be carried, (2) to prevent overloading the front axle; that is, to make for this class of vehicles specific regulations of their size and front axle weight.

That is just what section 1033 accomplished. Paragraphs (a) and (b) restrict the height, the vertical size of this class of vehicles when loaded. They also keep down the center of gravity, restrict the vertical distribution of weight. Paragraph (c) restricts the height and it also prevents overloading the front axle; it is at the same time a regulation of height and of axle weight. Paragraph (d) prevents increasing the height of the load.

No clearer regulation of height and axle weight could be imagined.

If the means of regulation adopted have some reasonable relation to the end sought to be attained, the legislature is the sole judge of what means shall be selected. SPROLES *v.* BINFORD, supra (286 U. S. 374,

388-389); SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., supra (303 U. S. 177).

It hardly needs to be added that even if paragraph (c) be viewed alone, it is clearly a regulation of height and axle weight.

It is therefore plain that the act should be sustained as a regulation of size and weight, which cannot be superseded under section 225 of the Motor Carrier Act.

B. The Safety Requirements of the Interstate Commerce Commission Do Not Supersede the State Statute

Appellants urge (pp. 12-15) that the action of the Interstate Commerce Commission, pursuant to section 204 of the Motor Carrier Act (49 USCA § 304), in establishing its requirements with respect to safety of operation and equipment (R. 525a-1 to 525a-69), 1 M. C. C. 1, has the effect of superseding the state statute. We now submit that this is not correct. In subdivision C, following, we will show that the report of the Commission of March 11, 1939, upon which appellants rely heavily, adds no legal significance to such requirements. In these two subdivisions we consider the question of supersession independently of the point we argued in subdivision A; that is, we may assume for purpose of argument that the state statute is not a regulation of size and weight, and we will demonstrate that even under that assumption the statute is not superseded by any action of the Commission.

The Commission's requirements obviously are not regulations as to size and weight. They were established, necessarily, under the terms of section 204, and

they so show on their face (R. 525a-3). The first step in ascertaining the effect of the Commission's action under that section is a careful consideration of just what authority and power it confers upon the Commission. The following is the part material here:

> Sec. 204 (a) It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable **requirements** with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. (Boldface ours)

It will be seen that the power of the Commission as defined in that section and as related to the question in issue is to "establish reasonable **requirements** with respect to • • • safety of operation and equipment." The section expressly refrains from conferring the broad power to **regulate** safety of operation and equipment, as contrasted with the phraseology of section 225, which refers directly to "regulation" This point is fundamental in gathering, from the terms of the Motor Carrier Act, the intent of Congress as to the extent to which state power may be superseded by action of the Commission under the act.

"Requirement" as used in the act means a limitation upon conduct authorized by the act, OHIO AUTOMATIC SPRINKLER CO. *v.* FENDER, 108 Ohio St. 149, 141 N. E. 269; although it seems unnecessary to call for a defi-

nition of a word so plainly employed in its ordinary meaning. That the word has meant to the Commission limitation upon powers granted is evidenced from the "requirements" it has established pursuant to this authority (R. 525a-1 to 525a-69).

Section 1033 of the Pennsylvania Vehicle Code belongs to the class of laws which, as to the point now under consideration, are unquestionably valid in the absence of legislation upon the same subject by Congress. Regulation of this character has always been held to be within the sphere of state action. BRADLEY *v.* PUBLIC UTILITIES COMMISSION, 289 U. S. 92; CONTINENTAL BAKING CO. *v.* WOODRING, 286 U. S. 352; SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., supra (303 U. S. 177); CLARK *v.* PAUL GRAY, INC., supra, (306 U. S. 583).

Therefore, when an act of Congress, or regulations thereunder, do enter the field, the state statute is not superseded by them except where Federal occupation of the field is complete, that is, unless there is a direct repugnancy between state and Federal action. TOWNSEND *v.* YEOMANS, 301 U. S. 441; KELLY *v.* WASHINGTON, 302 U. S. 1. That occupation or repugnancy does not exist here.

Appellants claim that the Commission's requirements are "all inclusive and * * * apply to every type of truck operation on the highway" (Brief, p. 15), and especially as fortified by the Commission's report of March 11, 1939, they "occupy the whole field" of truck regulation (p. 17).* That thought overlooks

* Appellants indicate (Brief, p. 17) that they are no longer contending as they did in the court below that the mere enactment of the Motor Carrier Act superseded the Pennsylvania law, in view of their interpretation of the holding of this court in H. P. WELCH CO. *v.* NEW HAMPSHIRE, supra (306 U. S. 79).

the point that the Commission's power is limited to establishing "requirements", but we do not need to consider that point at this time. The Commission's requirements show on their face that they are not and actually were not intended to be "all inclusive" and to "occupy the whole field", but that they are only a limited set of requirements.

In the first place, the requirements are on their face incomplete. They plainly do not purport to be a complete traffic code. They leave certain important items of control to the states. Therefore, they can not be construed as an occupation of the entire field of traffic regulation. Since they do leave to the states some highly necessary regulatory duties, they can be considered at the very most as only a set of individual rules covering certain specific phases of traffic regulation and not as a comprehensive code designed to be all inclusive of the entire subject matter.

We will cite instances to show that the requirements are incomplete. One of the most important and necessary means of motor traffic control now exercised by the states (including their governmental subdivisions) is the regulation of traffic at intersections by stop and go lights and by stop signs. There is no mention in the requirements of the conduct of a motor carrier with respect to them. One who claims that the requirements supersede all of the states' powers to regulate traffic must say that state laws and ordinances as to stop and go lights are thus superseded. Obviously that claim would be an absurdity.

Another traffic rule now enforced by all of the states but absent from the Commission requirements has to do with precedence of traffic at highway intersections where there are no regulating signs or lights. The

traffic codes of all of the states provide that when two vehicles enter an intersection at the same time the driver on the left shall yield to the driver on the right. Assuredly interstate motor carriers are not freed from compliance with this natural and necessary rule because the Commission has issued its requirements which are silent on this point.

Likewise all of the states require drivers before making a turn to indicate by an arm or light signal the direction of the intended movement. The Commission requirements are silent as to this, and the Commission intentionally refrained from requiring lighted directional signals (R. 525a-21). The foregoing is also true as to state statutes with respect to waiting behind street-cars while loading or unloading and passing street-cars, forbidding the use of sirens or bells on any except police, fire or other emergency vehicles, and regulating parking.

We anticipate the possible objection to the foregoing that it was unnecessary for the Commission to establish requirements as to matters which are universally regarded as safety precautions; but that objection is not well taken. The Commission did make rules as to elementary conduct; for example, it required driving on the right side of the highway (R. 525a-38), and forbade coasting downhill with clutch disengaged (R. 525a-41).

The Commission could hardly have intended its "regulations" to supplant all state traffic laws. In the Commission's report accompanying its general requirements it is stated (R. 525a-8) that the "regulations" are part of a "long-term program," the elements of which are summarized. Then it is stated that

the present "regulations" cover only a part of that program, as follows (R. 525a-9):

> 2. *Initial regulations.*—The regulations now promulgated cover four points in the broad, long-term program; qualifications of drivers, with identification of each driver, rules for the driving of motor vehicles, parts and accessories necessary for safe operation, and reporting of accidents.—

It is submitted that the foregoing summary shows on its face that "regulations" of the specified classes do not even approach the field of regulation covered by the Pennsylvania statute in issue. The statute does regulate the class of vehicles to which it applies, but it has nothing to do with, for example, "parts and accessories necessary for safe operation," or anything else described in the above summary. Conversely, the Commission's requirements can be applied in every respect to the vehicles regulated by and complying with the state act, or those not complying for that matter. There is nothing in the state act which prevents enforcement of or compliance with the Commission's requirements.

The decisions of this court plainly establish that under the circumstances here disclosed, the Pennsylvania statute is not superseded by the Commission's requirements.

In SAVAGE *v.* JONES, 225 U. S. 501, the attack was upon an Indiana statute which prohibited sales of concentrated commercial stock feeds in original packages unless a statement of the formula of the ingredients was shown upon the package. A Minnesota manufacturer sued to invalidate the act on the ground that it

was superseded by the Federal Pure Food and Drugs Act, which, among other things, forbade the introduction into any state "of any article of food or drugs which is adulterated or misbranded." The complainants' argument was similar to that made by appellants here; that by establishing certain "requirements" Congress had occupied the field, and that a manufacturer who complied with these "requirements" could not be compelled to comply with the additional requirements of the state statute. In sustaining the Indiana statute this court said (pp. 531-532):

> It will be observed that in its enumeration of the acts which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances, where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article "for the purposes of this act" shall be deemed to be misbranded if the package or label bear any statement, design or device regarding it or the ingredients or substances it contains, which shall be false or misleading (No. 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are.

In Missouri, Kansas & Texas Railroad Co. *v.* Haber, 169 U. S. 613, there was involved a Kansas statute forbidding the bringing into the state of cattle capable of communicating certain diseases, and creating civil

liability to one injured by a violation of the statute. Haber recovered judgment against the railroad on the ground that it had, in violation of the statute, transported cattle into Kansas which had infected his herd. The railroad defended on the ground that by the Animal Industries Act, which forbade the transportation of diseased animals in interstate commerce, and provided regulations for enforcement of such prohibition, and the Interstate Commerce Act, the federal government had so occupied the field as to exclude the state. This court sustained the judgment and the state act, holding that even though the railroad might have complied in all respects with the federal act, nevertheless the state law imposing civil liability involved subject matter not covered by the federal act and therefore was not superseded by it. The court said (pp. 638-639):

> And we adjudge that if Congress could authorize the carrying of such cattle from one state into another state, and by legislation protect the carrier against all suits for damage arising therefrom, it has not done so, nor has it enacted any statute that prevents a state from prescribing such a rule of civil conduct as that found in the statute of Kansas.

In Carey v. South Dakota, 250 U. S. 118, the two foregoing cases are cited as authority. Carey was convicted of violating a South Dakota statute which forbade shipping wild duck out of the state. His defense was that the Federal Migratory Bird Act superseded the state law. The federal act provided that all migratory birds, including wild duck, "shall hereafter be deemed to be within the custody of the gov-

ernment of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided for." Carey had killed the ducks during the open season in South Dakota provided by the federal regulations and had shipped the ducks out of the state. He contended that since the federal act and regulations permitted him to kill the ducks, the state could not forbid him to transport them in interstate commerce. In sustaining the state law this court said (p. 122):

> It is, however, urged that Congress has manifested its intention to assume exclusive jurisdiction of the subject; and that the failure to make any provision in Federal act concerning shipping, evidences the purpose of Congress that the shipping of game birds shall not be prohibited. This argument rests upon the clause which declares that the migratory birds "shall hereafter be deemed to be within the custody and protection of the Government of the United States." But that clause may not be read without its context; and the words immediately following show that the custody and protection is limited to prohibiting their being "destroyed or taken contrary to regulations" which are to fix the closed seasons in several zones. If, reading the Federal act as a whole, there were room for doubt, two established rules of construction would lead us to resolve the doubt in favor of sustaining the validity of the state law. First: The intent to supersede the exercise by a state of its police powers is not to be implied unless the act of Congress,

fairly interpreted, is in actual conflict with the law of the state. SAVAGE *v.* JONES, 225 U. S. 501, 533; MISSOURI, K. & T. R. Co. *v.* HABER, 169 U. S. 613, 623.

In NEW YORK, N. H. & H. R. R. Co. *v.* NEW YORK, 165 U. S. 628, the railroad attacked a statute of New York forbidding operation in that state of cars heated by stoves or furnaces. In sustaining the act the court said:

> Our attention is called to the clause in the Act of June 15, 1866, * * * now a part of No. 5258 of the revised statutes of the United States providing "that every railroad company in the United States whose road is operated by steam, its sucessors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges and ferries, passengers, troops, government supplies, mails, freight, and property on their way from any state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." We fail to perceive that this statute has any bearing upon the question now before the court. The authority conferred by it upon railroad companies engaged in commerce among the states, whatever may be the extent of such authority, does not interfere in any degree with the passage by the states of laws having for their object the personal security of passengers while traveling, within their respective limits, from

one state to another on cars propelled by steam,

These four cases demonstrate that where Congress, or a federal agency to an act of Congress, has established "requirements" regulating interstate commerce, a state may nevertheless add additional requirements which are not included within the federal regulations, within the scope of its valid police power and for the purpose of promoting safety.

Numerous other cases could be discussed which sustain this principle. See REID *v.* COLORADO, 187 U. S. 137; ASHEL *v.* KANSAS, 209 U. S. 251; CHICAGO R. I. & P. R. Co. *v.* ARKANSAS, 219 U. S. 453; MINTZ *v.* BALDWIN, 289 U. S. 346; ATCHISON, T. & S. F. R. Co. *v.* RAILROAD COMMISSION, 283 U. S. 380; MISSOURI PACIFIC R. Co. *v.* NORWOOD, 283 U. S. 249.

The authorities cited by appellants do not support their position. Rather, they demonstrate, upon analysis, that the Commission's requirements do not supersede section 1033. For example, appellants rely on the decisions of this court in NORTHERN P. R. Co. *v.* WASHINGTON, 222 U. S. 370; OREGON-WASHINGTON R. & NAV. Co. *v.* WASHINGTON, 270 U. S. 87; NAPIER *v.* ATLANTIC COAST LINE R. Co., 272 U. S. 605, and the dissenting opinion MISSOURI P. R. Co. *v.* LARABEE FLOUR MILLS Co., 211 U. S. 612. All of these decisions were ruled as not being in point by this court in H. P. WELCH Co. *v.* NEW HAMPSHIRE, supra (306 U. S. 79), which indicates that in no event will there be supersession until there is complete coverage, by specific, identical items of regulation by both federal and state action, which does not exist here. The Connecticut and New Hampshire cases (brief pp. 18-20) are such

instances of joint occupation of identical fields, under section 215 of the Motor Carrier Act (49 USCA §315) relating to the financial responsibility of carriers.

On page 21 appellants discuss PENNSYLVANIA RAILROAD COMPANY *v.* PUBLIC SERVICE COMMISSION, 250 U. S. 566. That case is a good illustration of one of the reasons why section 1033 is not superseded by the Commission's requirements. There the state law required that the last car of every train be equipped at its rear with a platform thirty inches wide with guard rail and steps. Regulations of federal agencies specifically authorized mail cars to be built without end platforms, and further specifically authorized their use as the last car of a mail train. The court held that the specific regulations excluded the operation of the state law. Among other things the court said (pp. 568-569):

> If all that had been done on behalf of the United States in the way of regulation had been to determine how mail cars should be built, and to exclude a thirty-inch platform, it might be said that the state law could be obeyed by putting a different car at the end of the train. It would be a tax upon the railroad when the company wished to run a mail train wholly made up of mail cars, but it could be done and it is not necessary to say that the state could not require it.

This case demonstrates that there can be no supersession until in every detail there is a complete conflict between the state and federal regulation. Such conflict does not exist between section 1033 and the Commission's requirements, which as to "Parts and

Accessories Necessary for Safe Operation" (R. 525a-17) do not in any way touch upon the subject matter of the state law. And section 204 of the Motor Carrier Act, which authorizes only the establishing of requirements, does not contemplate that the enforcement of a state statute can be suspended by issuing a report like that of March 11, 1939.

In OREGON-WASHINGTON RAILROAD & NAVIGATION CO. *v.* WASHINGTON, 270 U. S. 87 (p. 22), there was involved an act of Congress which provided, as the court construed it, that no plant quarantine could be established in any state except by the Secretary of Agriculture. That act operated in a manner exactly the converse of the Motor Carrier Act. The latter act permits all state action to stand, at least until specifically superseded by federal action, H. P. WELCH CO. *v.* NEW HAMPSHIRE, supra (306 U. S. 79). The fundamental reason for the difference between the two statutes, and the two decisions, is clear. Absence from quarantine is the normal condition, just as state regulation of motor vehicle traffic is the necessary and normal condition. In each case the normal condition is not interfered with except by federal action.

Appellants next cite NAPIER *v.* ATLANTIC COAST LINE R. CO., 272 U. S. 605 (p. 23). That case affords them no benefit. A series of acts of Congress had built up regulation of railroad locomotives until every part was specifically, by statute and regulation, under direct control of the Commission. Every locomotive in the country was assigned for purpose of regular supervision and inspection to one of the Commission's inspectors. Section 6 of the Act of 1911 (36 Stat. 913) provided "That it shall be the duty of each inspector

to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, * * *." Section 2 of the amendment of 1924 (43 Stat. 659) placed under the direct supervision of the Commission and its inspectors every "locomotive, its boiler, tender, and all parts and appurtenances thereof," and provided for "inspections from time to time" and for "tests as may be prescribed in the rules and regulations hereinafter provided for." This court said (p. 611):

> Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, construction and the material of every part of the locomotive and tender and of all the appurtenances.

Contrast that situation with the one in issue here. No such inclusive language is used in the Motor Carrier Act. The Commission is authorized by section 204 "to establish reasonable requirements with respect to * * * safety of operation and equipment." At least until specific requirements are established to take their place state regulations are not superseded, H. P. Welch Co. *v.* New Hampshire, supra (306 U. S. 79).

The requirements now established by the Commission are limited in extent and specific in nature, and do not pretend to reach the field occupied by the state law (lowering of center of gravity, reducing weight on front axle, etc). There is a clear and vast difference between the NAPIER case and this one.

The other cases cited by appellants are no different from those heretofore discussed. We rely on some of them. We think it would unduly extend this brief to discuss each individually.

C. The Commission's Report of March 11, 1939, Does Not Supersede the State Statute

Appellants urge (brief p. 16) that even if the Commission's requirements did not of themselves supersede the statute, nevertheless that was accomplished when those requirements were buttressed by the Commission's report of March 11, 1939, in Ex Parte MC 4, entitled "In re: Car-over-cab operations," 12 M. C. C. 127.*

We have pointed out that the Commission's safety requirements do not of themselves supersede section 1033. We now say that the report of March 11, 1939, does not add anything to the effect of the requirements, and does not of itself supersede the state's power. That is demonstrated by considering (1) the terms of the Motor Carrier Act, 1935 (49 U. S. C. 301-327), upon which the Commission's action is based, (2) decisions of this court as to the effect of a report of this character, (3) the language of the report of

* Although this report was not actually a part of the record before the court below (R. 693), nevertheless both appellants and appellees argued the effect of this report at length, both in oral argument and by brief.

March 11, 1939, and (4) a recent report of the Commission construing its own powers.

The authority under which the Commission presumed to act in issuing its report is section 204 (49 U. S. C. 304), which has been discussed to some extent in the first part of the preceding subdivision of this brief. It will be recalled that the power of the Commission as defined in that section and as related to the question in issue is to "establish reasonable requirements with respect to * * * safety of operation and equipment." It is our position at this point that the report of March 11, 1939, does not establish any requirement.

In several decisions this court has construed the nature and effect of reports similar to that of March 11. Under the authority of those cases the Commission's March 11 report is not a "requirement" within the terms of section 204.

Thus, in UNITED STATES *v.* ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY, 282 U. S. 522, the Commission had issued a report containing the following passage (p. 524):

> Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report.

The court held this was not an order that could be reviewed by a three-judge court under the terms of 28 USCA 41 (28), saying (p. 528):

> The action here complained of is not in form an *order*. It is a part of a *report—an opinion* as distinguished from a mandate. The distinction between a *report* and an *order* has been observed in the practice of the Commission ever since its organization—and for compelling reasons. (Italics supplied).

In ROCHESTER TELEPHONE CORPORATION *v.* UNITED STATES, 307 U. S. 125, the court (p. 143) declared no longer controlling earlier distinctions between "negative" and "affirmative" orders of the Commission. But the court indicated that its decision did not affect its previous holding in UNITED STATES *v.* ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY, supra. The court referred in the ROCHESTER case to the report in the latter case as a "mere abstract declaration" (307 U. S. 143, footnote 30).

So under the authority of the two above cited cases the Commission's report of March 11, must be characterized as "a mere abstract declaration" and not a "requirement". Identical in sustaining our contention on this point are SHANAHAN *v.* UNITED STATES, 303 U. S. 596, and ILLINOIS CENTRAL RAILROAD CO. *v.* PUBLIC UTILITIES COMPANY OF ILLINOIS, 245 U. S. 493.

The language used by the Commission in its report of March 11, 1939, shows on its face that the report does not add anything to the effect of its requirements, and does not supersede the Pennsylvania statute. The report stated in part, (quoted from appellants' brief, p. 16):

> The safety regulations heretofore prescribed by us, of course, apply to these as well as other vehicles operated by common and contract carriers in interstate or foreign commerce. The operation of vehicles so equipped are therefore permitted by the existing regulations and there is no need for change
> • • •

The effect of this report to supersede the state power is expressly made dependent upon the safety regulations theretofore prescribed by the Commission. Clearly, the report could not of its own force supersede the state power if the safety regulations relied upon as permitting the car-over-cab operations did not so supersede the state power. This is what the Supreme Court of Pennsylvania referred to in characterizing this report as "negative" in character (R. 693a).

A more recent report of the Commission construing the meaning of the phrase "establish reasonable requirements" in section 204 (a) of the Motor Carrier Act supports our contention. This report was dated May 9, 1939, in the proceeding entitled Ex Parte No. MC-28, "Jurisdiction over employes of common contract and private motor carriers under section 204 (a) of the Motor Carrier Act, 1935", 13 M. C. C. 481. In that report the Commission decided that its authority to prescribe qualifications and maximum hours of service of employes of motor carriers under section 204 (a) was limited to prescribing such regulations for those employes whose duties affect the safety of operation of motor vehicles. The Commission held that to establish "requirements", with respect to

"qualifications and maximum hours of service of employes"; it would be necessary for it to lay limitations and restrictions upon such employes and their hiring.*

There is a vast difference between what the Commission construed to be necessary to establish "requirements" as revealed in its report last cited, and in what the Commission did in its report of March 11, 1939, upon which appellants rely. The Commission might have taken in Ex Parte MC-28 the same position that it took in its report of March 11, 1939, i. e., in Ex Parte MC-28 the Commission might have decided that for various reasons the employes in question (those not operating motor vehicles) were of such character and their activities were such that nothing needed to be done about them except regulate their hours. That action would have been precisely sim-

* The basis of the Commission's decision is found in the following paragraph of its opinion (pp. 485-486):

> The qualifications for drivers so prescribed, for the particular purpose in view, have been accepted by the industry as practical and reasonable and have been adopted by the officials of a number of states. Our experience and the study we necessarily made in connection with the administration of the Motor Carrier Act qualify us to prescribe such regulations, to promote safety of operation. Quite the contrary would be true if we were called upon to prescribe general qualifications for all employes of such carriers. In the case of clerks, salesmen, and employes acting in an executive capacity, physical infirmities have little, if any, effect upon the ability of an employe to perform satisfactory work. Education and training are important qualifications for such employment, but other and more intangible factors are of like importance. An employe's personality, appearance, ambition, and industry are valuable and important attributes. It would be a very difficult task, and one wholly foreign to the Commission's normal functions, to prescribe standards for such qualifications. It is our opinion that, if the statute be interpreted to give us the power to prescribe general qualifications for all employes, it would lead to an unreasonable if not an absurd result and we must, therefore, under the rule of statutory construction already referred to, determine the intent of Congress from the legislative history of the enactment and consideration of the purposes of the act as a whole.

ilar to what the Commission did in its report of March 11, 1939, on car-over-cab operations. But instead of that, in Ex Parte MC-28, the Commission held that "requirements" means the necessary exercise of limiting and restrictive action on its part; and finding that such action "would lead to an unreasonable if not an absurd result", the Commission held the intent of Congress to be that employes other than those whose duties related to safety of operation were not included within the terms of the act.*

The objection may be made with respect to car-over-cab operations that the Commission can do no more than it has done in its report of March 11, 1939; that is, that the Commission has taken all the action it can take as a practical matter, and therefore its action does constitute a requirement within the terms of section 204.

But this objection only serves to re-emphasize the rather evident point that the plain words of the Motor Carrier Act were employed by Congress with the deliberate intention of limiting the extent to which the Commission, by its own action, may cause state authority to be superseded by the exercise of federal

* The Commission has been held to be in error, in the decision made in this report, by a District Court of three judges, one judge dissenting, F. Supp. , and the Commission has appealed to this court, but what may be decided eventually will not affect the point we have just made. Appellants refer to that case (Brief, pp. 30-33). A reading of the District Court's opinion will disclose that appellants' understanding of it, as revealed by their brief, is entirely erroneous. Both the opinion of the court and that of the dissenting judge show that they construe "requirements" to mean requirements, not a report like that of March 11, 1939. In that respect all three of the members of the court agreed with what the Commission said in the matter carried to the District Court. And we should perhaps say that what appellants claim about the case is entirely at variance with the holding of this court in H. P. Welch Co. *v.* New Hampshire, supra (306 U. S. 79).

power. The regulation authorized by section 204 (a) is not all-inclusive, but is limited to the establishment of reasonable requirements. If the Commission had power to regulate, not restricted by the present limiting words, then there might be a basis for argument that the Commission's regulations constituted an occupation of the field by regulatory action, but where, as here, the regulation can be exercised only by the establishing of requirements, then something that is not a requirement is not a federal occupation of the field.

Along these lines section 204 (a) (1) should be compared with section 225 of the Act (49 USCA 325), which has been set out in full earlier in our brief. In section 225 while the Commission's authority is limited to investigation and report, it is to report not on the need for "requirements", but for **regulation** The words "requirements" in section 204 and "regulation" in section 225 are plainly used to express different meanings.

Therefore, it is no answer to our preceding argument to say that since the Commission could do nothing toward establishing requirements other than the action expressed in its report of March 11, 1939, that report constitutes a "requirement". The difficulty with that argument, as pointed out above, is that Congress obviously intended to go no farther at the most than to permit supersession of state power by the establishment of actual requirements or limitations upon the carriers' conduct.

We now desire to call attention to a point which we think has been evident throughout our argument in this and the preceding subdivision of our argument

(B). One reason why the Commission could go no farther in its report of March 11, 1939, and in its previously established requirements, is that to have gone farther and established regulations for this type of vehicle, similar or analogous to those of section 1033, would have been to establish regulations of size and weight in excess of the Commission's power.

Appellants repeatedly criticize (Brief pp. 32-41) the construction placed upon the report of March 11, 1939, by the Supreme Court of Pennsylvania and pretend that that court entirely overlooked the safety requirements theretofore promulgated by the Commission at Ex Parte No. MC-4. However, a reference to the opinion of the Supreme Court of Pennsylvania clearly indicates that the safety regulations of the Commission at Ex Parte No. MC-4 were considered when the court said, in speaking of supersession:

> * * * our conclusion is that neither the Motor Carrier Act, 1935, nor any regulation of the Interstate Commerce Commission has superseded the legislative power of this state to enact and enforce section 1033 (c) of the Vehicle Code. (R. 692)

The discussion immediately following this language shows beyond any doubt that the court was thereafter considering the report of March 11, 1939, when it said:

> In arriving at this conclusion we have not overlooked the report of the Interstate Commerce Commission originally dated December 23, 1936, which is printed as an appendix to plaintiffs' brief. * * * (R. 692)

In thereafter determining (R. 693) that the report was negative in character, based entirely on ex parte

testimony and cannot be regarded as replacing the state law on this subject, the Pennsylvania court was undoubtedly construing the report of March 11, 1939 because (a) it limited its discussion to the "report" printed in plaintiffs' brief (which was the March 11 order only), (b) it mentions that the proceedings in Ex Parte No. MC-4 were "**originally**" dated December 23, 1936, and (c) the footnote shows that the report was captioned "In re, car-over-cab operations" (R. 692). The original requirements issued under Ex Parte No. MC-4 had been ruled upon previously, as noted supra. Therefore, appellants have no justification for attempting to confuse this court on what the Supreme Court of Pennsylvania was passing upon.

Moreover, the conclusions of the Supreme Court of Pennsylvania, as to the report of March 11, 1939, were correct. The report was negative in character, since it did not purport to describe additional requirements, but simply stated that "there is no need for change". The Commission in stating that the operation of car-over-cab equipment was permitted by existing regulations, was merely saying that their operation was not prohibited by existing requirements. If the Commission believed that its requirements permitted the operation of such equipment to the exclusion of state interference, it was mistaken, and a mere assertion of this belief could not supersede the state statute.

Likewise, the proceedings on which the March 11 order was based, were ex parte in the most undesirable sense. The report shows on its face that only the evidence presented by owners of car-over-cab equipment was received and considered, and that no independent investigation was made by the Commission except an investigation of the one-sided record

thus presented. The report also shows that the Commonwealth's representatives did not participate in the hearing, and that the Commission did not permit any of the kind of testimony developed at the trial of the present case to interfere with its decision based on the ex parte record. Much could be said about the lack of comity shown by the Commission in reviewing the decision of the Dauphin County Court and in enabling the appellants and intervenors to manufacture a situation upon which they might seize as an intervention by the federal government in this particular field of safety regulation to the detriment of the power of the respective states.

The inconsistency of the Commission in accepting for the basis of its March 11 report accident statistics offered by the petitioners (all of which violated the hearsay rule, as argued in division I, part C-7 of this brief), is shown by its report published in December 1938, entitled "Motor Carrier Accidents" from April 1 to December 31, 1937, in which the Commission attempted to analyze the accidents reported by the various carriers under the Motor Carrier Act. Table 26 of that report shows that carriers transporting automobiles were involved in 212 accidents during the 9 months' period, or 7.5% of the total of such accidents reported. By way of explanation the report stated:

> Prior to the effective date of the Commission's regulations, no governmental statistics were in existence as to accidents sustained by bus or truck operators on a nation-wide basis. There must, therefore, be unavoidable lack of comparisons with accident experience of prior years.

> Caution should be exercised in drawing any conclusions from data presented in this report owing to certain unknown factors, such as lack of information concerning exposure to and responsibility for accidents. No data concerning an accident exposure factor, such as accidents per 100,000 miles of vehicle operation, have been accumulated. The absence of facilities for thorough investigation has precluded the development of facts necessary to determine responsibility for the accidents covered by this report.

Some of the same caution should have been exercised in the report of March 11, because when that report was issued the motor carrier accident report had already been published and the statistics therein contained were available to the Commission. Instead the Commission chose to rely solely upon the petitioner's own statistics without investigation or corroboration.

In ruling that the report of the Commission, dated March 11, 1939, could not be regarded "as having a purpose to replace existing law upon the subject", the court was referring to the language of Mr. Justice Butler in H. P. WELCH CO. *v.* NEW HAMPSHIRE, supra (306 U. S. 79), which it quoted with approval (R. 692), as follows:

> • • • In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, **it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking**

> **effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed.** * * * (Boldface ours)

Finally, appellants have distorted the decision of the Supreme Court of Pennsylvania so as to rule that the Interstate Commerce Commission has only the power to investigate and report and not to adopt requirements. It should be kept in mind that the court was speaking of the Pennsylvania statute as a size and weight measure which could not be superseded under the limitations imposed by section 225 of the Motor Carrier Act. This is shown by the statement of the court (R. 690) relying upon and quoting the rule as laid down by this court in KELLY *v.* WASHINGTON, supra (302 U. S. 1), in which Mr. Chief Justice Hughes said (p. 10):

> * * * There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together". * * *

The court below did refer in passing to the distinction that has been drawn between the jurisdiction of

the Interstate Commerce Commission over commercial considerations pertaining to interstate truck business, as compared with the jurisdiction of the states over the preservation and safety of the roads: THOMPSON *v.* MACDONALD, 95 F. (2d) 937, 943 (C. C. A. Tex. 1938), affirmed without passing upon supersedure in 305 U. S. 263. In support of this viewpoint, it should be noted that the term "safety" has a variety of meanings. For example, in the operation of a bus line, safety would refer primarily to the passengers within the bus and jurisdiction over this type of regulation is possibly vested in the Commission. However, the citizens of a particular state, who also use the highway and whose lives may be endangered by the manner in which the bus is operated, should be entitled to rely upon the laws of their respective states for protection and safety. As will be argued in the next division of this brief, the right of Congress to supersede a state's laws for the protection and safety of its own highways is open to serious question.

D. The Federal Government Lacks Fundamental Power to Supersede State Highway Safety Laws.

We now submit a point which we think is fundamental with respect to the relationship between the federal government and the states in the police regulation of interstate motor vehicles upon the highways. It is submitted that Congress has no power to enact laws which have the effect of superseding the power of the states to enforce the states' laws relating to safety of operation of motor vehicles upon the states' highways. This point calls for the application of different principles than have prevailed heretofore with respect to the power of Congress to supersede state laws regulating railroads and other interstate

activities. The fundamental element which was wanting in that class of cases is the fact that the states in their governmental capacity own, build, maintain and regulate their highways. Hence it is necessary to approach this subject from an entirely new point of view.

It should be particularly understood that what we are talking about is **supersession.** We are not saying that state laws regulating the use of their highways may not be unconstitutional for other reasons. That is, even in the absence of supersession a state law may be so arbitrary, unreasonable or discriminatory as to violate the fourteenth amendment, the Commerce Clause, or some other constitutional provision. So, while a state law regulating the safety of operation of interstate motor vehicles must not be arbitrary, unreasonable or discriminatory, yet we say the power to enact and enforce reasonable laws of that character cannot be taken from the states by an act of Congress by the process commonly known as supersession.

While this proposition has never been decided by this court, and while, as we say above, it differs entirely from the cases heretofore decided by this court on the subject of supersession, it is not a new idea. It did not originate in this brief. We appreciate that an opinion expressed at a hearing before a committee of Congress is of little or no value upon a question of law of this character, yet we desire briefly to point to the view expressed by Chairman Eastman of the Interstate Commerce Commission when testifying before the Senate Committee on Interstate Commerce 74th Congress, on S. 1629 (which is the bill in the form practically as enacted as the Motor Carrier Act 1935). Chairman Eastman was then a member of the Interstate Commerce Commission and Coordinator of

Transportation. His testimony was with respect to the question of the power of the federal government to supersede the enforcement of state laws regulating size and weight of motor vehicles, but it seems obvious that other regulations of traffic would be within the same principle. Mr. Eastman said (hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1629, page 61):

> But on this question of sizes and weight of motor vehicles, which is an extremely important matter from the standpoint of public safety and convenience, there is not only the question there as to what those sizes and weights ought to be from the standpoint of road construction and road use, but there is also the legal question as to whether the federal government can exercise power over that matter, or whether it is a matter that is exclusively within the jurisdiction of the States. It was because of doubts not only as to the facts with reference to that matter, but also as to the law, that provision was made for this investigation.

And he further said (p. 92):

> In answer to one of your questions I started to say something about the regulations with respect to the sizes and weights of vehicles. It is true that by drastic and unreasonable regulations of that character one state might interfere with interstate commerce and prevent the reasonable operation of vehicles in interstate commerce. We do not undertake in this bill to cover that situation, except to pro-

> vide for a thorough investigation of it by the Commission, with recommendations to Congress, because there is involved there not only a question of fact as to what the regulation should be but also as to how far the federal government has power to interfere with the exercise of the police power by the states with respect to the use of their highways.
>
> They have the right to protect their highways against unsafe or unreasonable use; but whether or not the federal government can come in and interfere with it, I cannot say at this time.

It will be observed that section 225 of the Motor Carrier Act, 1935 (49 U. S. C. 325) authorizes the Commission only to report to Congress upon the need for federal regulation of size and weight, thereby reflecting the opinion and recommendation of Chairman Eastman. And we submit that it is particularly significant that section 204 does not authorize the Commission to "regulate", which is a wide and all-inclusive term, but only to "establish reasonable requirements". Requirements only add to a carrier's obligations; they do not supersede state power, as would general regulation.

In approaching this question a first consideration is the nature of a state's activities in building, maintaining and controlling highways. It is axiomatic that the states are owners of their highways, SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., 303 U. S. 177; and that they are a governmental function, BRUSH *v.* COMMISSIONER OF INTERNAL REVENUE, 300 U. S. 352, pp. 372-373. It is further established beyond question that the states, in building, maintain-

ing and charging taxes for the use of their highways, are not engaged in interstate commerce. HENDERSON BRIDGE CO. *v.* KENTUCKY, 156 U. S. 150; DETROIT INTERNATIONAL BRIDGE CO. *v.* CORPORATION TAX APPEAL BOARD, 294 U. S. 83.

In DETROIT INTERNATIONAL BRIDGE CO. *v.* CORPORATION TAX APPEAL BOARD, supra, this court held that a corporation owning, operating and maintaining a bridge over an international stream between the United States and Canada, and charging tolls for its use, was not engaged in foreign commerce. A Michigan statute required (p. 84):

> * * * that "every corporation organized or doing business under the laws of this state * * * shall * * * for the privilege of exercising its franchise and of transacting its business within this state, pay * * * an annual fee * * * upon each dollar of its paid up capital and surplus * * *"; but no property or capital located without the state "and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation * * *."

The powers of the bridge company were solely the following (p. 85):

> To operate the highway bridge, known as the Ambassador Bridge, across the Detroit River, from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and the appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.

> To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use.

In holding the bridge company subject to the Michigan tax this court said (p. 86):

> After much consideration, and notwithstanding emphatic dissent, HENDERSON BRIDGE Co. *v.* KENTUCKY, 166 U. S. 150, held that a Kentucky Corporation which owned and operated a bridge over the Ohio River between that state and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. By Chief Justice Fuller this Court said (p. 153):
>
> "The company was chartered by the State of Kentucky to build and operate a bridge, and the state could properly include the franchises it had granted in the valuation of the company's property for taxation. CENTRAL PACIFIC RAILROAD *v.* CALIFORNIA, 162 U. S. 91. The regulation of tolls for transportation over the bridge considered in COVINGTON & CINCINNATI BRIDGE Co. *v.* KENTUCKY, 154 U. S. 204, presented an entirely different question.
>
> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

It is now further submitted that in making and enforcing laws for the regulation of traffic the states are not regulating interstate commerce but are protecting and maintaining their highways. General traffic laws, as distinguished from laws regulating size and weight, are as much for the protection of the physical highway and its appurtenances as for the protection of travelers on the highway.

This court has always held that state laws enacted for the protection of the state's property are valid; that they are not regulations of commerce but are the exercise of state power looking to the preservation of its own property rights. BAYSIDE FISH FLOUR CO. *v.* GENTRY, 297 U. S. 422; SILZ *v.* HESTERBERG, 211 U. S. 31.

MCREADY *v.* VIRGINIA, 94 U. S. 391; GEER *v.* CONNECTICUT, 161 U. S. 519. See also HUDSON COUNTY WATER CO. *v.* MCCARTER, 209 U. S. 349. The FEDERAL MIGRATORY BIRDS ACT (16 U. S. C. 703-711) was sustained under the power of the United States to effectuate its treaties with foreign nations. MISSOURI *v.* HOLLAND, 252 U. S. 416. Prior to that decision it had been held that the Commerce Clause did not confer upon the federal government the power to take regulation of wild game away from the states, UNITED STATES *v.* MCCULLAGH, 221 Fed. 288, and doubt on that point had been expressed in this court, CAREY *v.* SOUTH DAKOTA, supra (250 U. S. 118, 122).

From the record, it appears that the Pennsylvania statute prohibiting car-over-cab operations applies not only to common and contract carriers in interstate commerce, but also to such carriers in intrastate commerce (R. 423a, 351a), and also to privately-owned and

operated equipment (finding of fact of trial court No. 12, R. 482a, 357a, 358a). Under the foregoing decisions, Pennsylvania is entitled under its police power to enact a statute for the protection and safety of its highways and the traveling public, and such an act should not be subject to federal interference or supersedure.

III.

STATE STATUTE VALID UNDER THE COMMERCE CLAUSE

The Commerce Clause does not of its own force supersede the state statute.

After arguing in part I of their brief that the state law is superseded by the Motor Carrier Act, 1935, and action of the Interstate Commerce Commission taken under its authority, appellants assert in part II (p. 41) that "even in the absence of federal legislation" section 1033 (c) is rendered invalid by reason of the Commerce Clause.

There is obviously no merit in appellants' contention. The evidence and the findings of both courts below establish the act as a valid exercise of the state's police power, and the decisions of this court sustain its validity. BRADLEY *v.* PUBLIC UTILITIES COMMISSION, supra (289 U. S. 92); MORRIS *v.* DUBY, supra (274 U. S. 135); SPROLES *v.* BINFORD, supra (286 U. S. 374); SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., supra (303 U. S. 177); CLARK *v.* PAUL GRAY, INC., supra (306 U. S. 583); CONTINENTAL BAKING CO. *v.* WOODRING, supra (286 U. S. 352).

Appellants cite as their lead-off case on this proposition GIBBONS *v.* OGDEN, 9 Wheat. 1. They overlook the point that the decision in that case was based upon the proposition that the federal government, by issuing Gibbons a license under the federal Coasting License

Act, had superseded the New York law. The actual holding is based on supersedure, hence the case is inapposite on this branch of appellants' argument.

However, if we heed some of the things that were said in the court's opinion, or in the concurring opinion of Mr. Justice Johnson, with respect to the power of the Commerce Clause, unaided by legislation, to exclude state action, then it is exceedingly important to keep in mind that what was being talked about was the bare power to determine who shall have the right to engage in interstate commerce, and not the conflict between the Commerce Clause and state laws relating to public safety. And in that respect GIBBONS *v.* OGDEN has its counterpart in two motor vehicle law cases, which cases have been sharply distinguished from other cases sustaining the state's police power over its highways. The two cases we refer to are BUCK *v.* KUYKENDALL, 267 U. S. 307, and BUSH *v.* MALOY, 267 U. S. 317, in which this court held that even in the absence of federal legislation a state had no power to deny an interstate motor vehicle carrier the right to operate upon the ground that the public convenience and necessity did not require such operation. Those two cases were distinguished from the police power cases in BRADLEY *v.* PUBLIC UTILITIES COMMISSION, supra (289 U. S. 92), where it was held that a state could exclude an interstate motor vehicle operator from a highway in the interest of public safety. Thus GIBBONS *v.* OGDEN is not authority for any of appellants' contentions.

The other cases cited by appellants are even less applicable, in view of the many decisions of this court sustaining the police power of the state with respect

to regulation of interstate motor vehicles upon the highways.

Where, as in the present case, the state statute is a valid exercise of the police power and satisfies the requirements of due process, this court has held that the statute is valid, even though a burden on interstate commerce results. In SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL BROS., supra (303 U. S. 177), Mr. Justice Stone said, after citing a number of cases:

> In each of these cases regulation involves a *burden* on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

And in the more recent case of EICHHOLZ *v.* PUBLIC SERVICE COMMISSION, 306 U. S. 268, 274, Mr. Chief Justice Hughes said:

> * * * But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * *

To the same effect, see ZIFFRIN *v.* REEVES, 308 U. S. —, 84. L. ed. (Adv.) 107.

Appellants have failed to prove that section 1033 (c) discriminates against interstate commerce in favor of intrastate commerce in any manner whatsoever. The burden is on the carrier in every case to

prove that the act complained of directly interferes with or burdens interstate commerce: INTERSTATE BUSES CORPORATION *v.* HOLYOKE STREET R. Co., 273 U. U. 45 (1927).

The only testimony on this subject was elicited from plaintiffs' witnesses on cross-examination, and was as follows:

1. William Lawrence, speaking for United States Truck Lines, testified that the conditions under the law would be the same whether or not his concern was engaged in intrastate or interstate commerce (R. 79a).

2. F. J. Boutell testified that the equipment of his concerns would be affected the same under the act whether engaged in intrastate or interstate business (R. 174a).

There is admittedly some intrastate haulaway business in Pennsylvania, as is evidenced by the following testimony:

1. J. R. Duplanche, Manager of the Nu-Car Carriers, in Chester, testified that on some of their operations they obtained cars from the Ford Motor Company factory, in Chester, and delivered them to Ford dealers in Philadelphia, Harrisburg, and other points in Pennsylvania (R. 423a).

2. Harry Edwards, a driver, testified that on one occasion he made such a trip from Chester to Philadelphia while driving a haulaway (R. 351a).

From the evidence before the court, it appears that section 1033 (*c*) would operate the same on intrastate and interstate commerce, and that there is some lim-

ited amount of intrastate commerce of this type in Pennsylvania. Nothing appears in the testimony to warrant this court in finding that the legislature has discriminated against interstate commerce by this act.

Since the Pennsylvania statute is a valid exercise of the police power and satisfies the requirements of due process and does not discriminate against interstate commerce in favor of intrastate commerce, its validity under the Commerce Clause cannot successfully be questioned.

IV.

1939 AMENDMENT TO STATE STATUTE CORRECTLY CONSTRUED

In part IV of their brief (pp. 66-72) appellants attack the construction by the Supreme Court of Pennsylvania of the present paragraph (c) of section 1033, and state that the paragraph should be construed differently by this court.

On this there are two preliminary points to be considered. The present paragraph (c) is a regulation of size and weight, as we have heretofore pointed out, and as such it is valid and not subject to supersession, under ample authority cited above. This leaves no substantial federal question in the case, hence no occasion for construction by this Court.

In the second place appellants' contention runs counter to the well-established rule stated in HICKLIN *v.* CONEY, 290 U. S. 169 (1933).

There a state law taxing and regulating interstate motor carriers was attacked as violative of the Commerce Clause. The state court's decision holding the statute valid depended upon a construction by it of the act. That construction was attacked in this Court, and was answered as follows (p. 172):

> Appellant complains of this construction of the statute as being contrary to its terms, but that question is not for us. The decision of the state court is controlling as to the meaning and extent of the statutory requirements.

See also as stating the same rule J. Bacon & Sons *v.* Martin, 305 U. S. 380, 381; Coverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 609; Morehead *v.* New York, 298 U. S. 587, 609; and Bingaman *v.* Golden Eagle Western Lines, 297 U. S. 626, 628.

The Supreme Court of Pennsylvania held that the new paragraph (c) accomplished no change in effect from the old. It should be noted that the legislature did in the 1939 act extend the effective date of paragraphs (a), (b), and (d) from January 1, 1940 to January 1, 1942. That is an easily observed legislative purpose.

Then it should be further noted that what the legislature did with respect to paragraph (c) was to make it more plain that the act is intended as a regulation of size and "weight". When the foregoing is observed there is no point to appellants' contention that under the Pennsylvania court's decision the legislature did a vain act in enacting the new paragraph (c).

What the court said was that the act as it now stands accomplishes just the same result as it did before the 1939 legislative action. Appellants are here seeking an injunction against the enforcement of the act. There is no evidence and no presumption exists that the Pennsylvania authorities will enforce the act against vehicles not lawfully and in plain terms within its scope. Enforcement of the act should not be restrained in whole or in part because of some idea on appellants' part that they might. Continental Baking Co. *v.* Woodring, 286 U. S. 352, 369.

Admittedly, new paragraph (c) embraces either the same number of car-over-cab operations as old paragraph (c), or else it embraces less (as appellants con-

tend). No one contends that the new paragraph is broader in scope than the old paragraph. Therefore, under appellants' contention, the record before the Supreme Court of Pennsylvania was sufficiently broad to enable that court to construe the new paragraph. For example, the testimony establishing the tendency of the car over the cab to become detached and to fly off in the event of a collision, was expressly made applicable to such equipment as placed the car over the cab on a Cantilever type construction from the trailer (R. 418a, 419a, Plaintiffs' Exhibit 3G, Model C, R. 532a). Professor Ulmann testified that if the Cantilever construction were broken, the car on top of the cab "would catapult forward over the nose of the tractor" (R. 419a). Cantilever type construction places the car over the cab without the direct weight thereof being on the tractor by means of side supports. However, the weight thereof can easily be transmitted through the trailer to the tractor and will affect the delicate balance of the haulaway equipment, regardless of whether the car over the cab is attached to the tractor. In the same manner, to a less degree, the tractor will be affected by the weight of a car on a trailer, which partially overhangs the cab. Therefore, we submit that the Supreme Court of Pennsylvania was entitled to construe the 1939 amendment to section 1033 (c) on the basis of the record before it, since the record was as broad in scope or (under appellants' contention) broader than the statute itself.

Finally, the Supreme Court of Pennsylvania had the duty to construe the 1939 amendment. At the time of its decision, the new paragraph was on the statute books, although not yet effective. In two months the old statute was to become obsolete, and the plaintiffs

would then have been in a position to lead the Commonwealth through another labyrinth of litigation, merely to construe a new statute which made no substantial change in the old one. The Supreme Court of Pennsylvania was sitting as a court in equity, and as such was obliged to avoid multiplicity of suits. No conscientious court would have side-stepped the obligation to construe the effect of such an amendment.

Accordingly, the decision of the Supreme Court of Pennsylvania construing the Pennsylvania statute should be affirmed.

Respectfully submitted,

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ADDENDA TO APPELLEES' BRIEF

No. 380, October Term, 1939
MAURER, et al. v. HAMILTON, et al.

To assist the Court in considering the question raised during appellants' rebuttal argument, as to whether the 1939 amendment to the 1937 State statute rendered this case moot, appellees desire to point out the following references in their brief:

In the last paragraph on page 4 of appellees' brief, under the heading "Jurisdiction of this Court" two decisions of this Court were cited which construed state statutes even though the statutes had been amended while the appeal was pending. Further consideration of the effect of the 1939 amendment is found on pages 106, 107, 108 and 109 of appellees' brief.

While appellants differ from appellees in the interpretation of the 1939 amendment, nevertheless their brief (p. 66) indicates that the amendment should be construed by this Court, and thus that the case is not moot.

Although the brief filed by the Solicitor General on behalf of the Interstate Commerce Commission as amicus curiae suggests (p. 2) that the question might possibly be moot, nevertheless argument on jurisdiction is left to the parties in the case. Moreover, the Solicitor General as Judge of the Circuit Court of Appeals, participated in the decision in BAKER DRIVEAWAY COMPANY, INC., et al. v. HAMILTON, et al., 29 Fed. Supp. 693, 694 (cited in appellees' brief, p. 2), which overruled as having no merit plaintiffs' contention that the Supreme Court of Pennsylvania did not have before it the amendment of 1939, and decided that "an examination of the opinion of the Supreme Court of Pennsylvania shows that * * * the amendment of 1939 * * * [was] carefully considered". Incidentally, an appeal from that decision to this Court has recently been allowed by the lower court.

Therefore, in view of the decisions of this Court and the absence of any contention to the contrary by either appellants or appellees, it is suggested that the 1939 amendment does not render the questions involved in this case moot.